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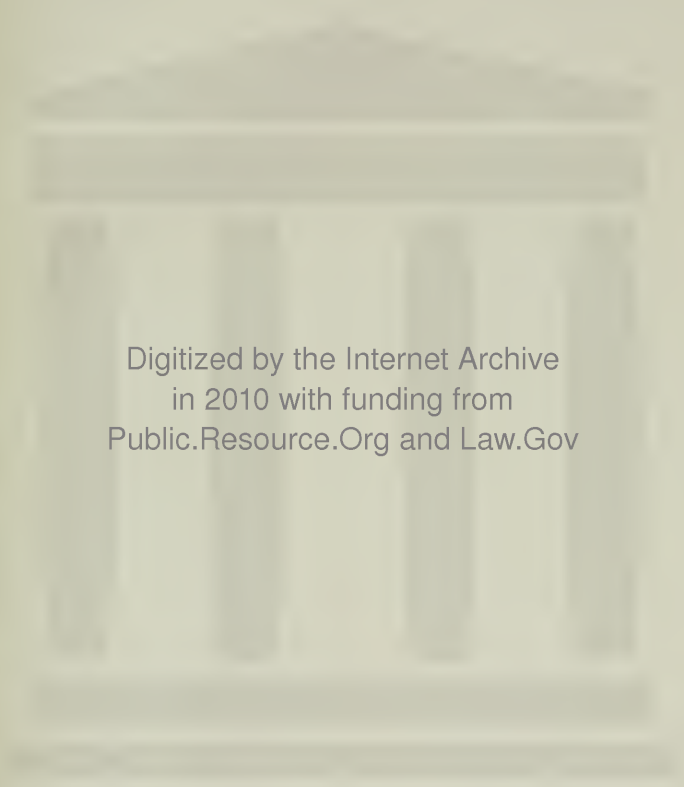
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2690
No. 12884

United States
Court of Appeals
For the Ninth Circuit.

CENTRAL FRUIT & VEGETABLE CO., and
WEST TEXAS PRODUCE COMPANY,

Appellants,

vs.

ASSOCIATED FRUIT DISTRIBUTORS OF
CALIFORNIA, RAYMOND M. CRANE,
RED LION PACKING COMPANY and
JOHN C. KAZANJIAN,

Appellees.

Transcript of Record

Appeal from the United States District Court,
Southern District of California,
Central Division.

No. 12884

United States
Court of Appeals
For the Ninth Circuit.

CENTRAL FRUIT & VEGETABLE CO., and
WEST TEXAS PRODUCE COMPANY,
Appellants,

vs.

ASSOCIATED FRUIT DISTRIBUTORS OF
CALIFORNIA, RAYMOND M. CRANE,
RED LION PACKING COMPANY and
JOHN C. KAZANJIAN,

Appellees.

Transcript of Record

Appeal from the United States District Court,
Southern District of California,
Central Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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For Appellees Raymond M. Crane, et al.:

HENRY O. WACKERBARTH,
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Los Angeles 13, Calif.

For Appellees Red Lion Packing Company, et al.:

AYNESWORTH & HAYHURST,
1012-1020 Helm Bldg.,
Fresno, Calif.

In the District Court of the United States for the
Southern District of California, Central Division
No. 8244-PH

CENTRAL FRUIT & VEGETABLE CO. and
WEST TEXAS PRODUCE COMPANY,

Complainants and Appellees,

vs.

ASSOCIATED FRUIT DISTRIBUTORS OF
CALIFORNIA, and RAYMOND M. CRANE,

Respondent and Appellee,

and

RED LION PACKING COMPANY, and JOHN
C. KAZANJIAN,

Respondent and Appellant.

NOTICE OF APPEAL

(From Reparation Order of Secretary of Agriculture.
Perishable Commodities Act of 1930)

To the Secretary of Agriculture, United States
Department of Agriculture, Production and
Marketing Administration; Central Fruit & Vegetable
Company, and West Texas Produce Company,
and to J. Manuel Hoppenstein, their attorney; and
to Raymond M. Crane, doing business as Associated
Fruit Distributors of California, and to Henry O.
Wackerbarth, Esq., his attorney:

You and Each of You Will Please Take Notice that John C. Kazanjian, doing business as Red Lion Fruit Packing Company, being a party adversely affected by the entry of a reparation order by the Secretary of Agriculture, does hereby appeal to the District Court of the United States, for the Southern District of California, Central Division (being the district in which a hearing was held in the above-entitled matter by the Secretary of Agriculture), from [2*] the reparation order entered by the Secretary of Agriculture in that certain proceeding pending before the Secretary of Agriculture, United States Department of Agriculture, Production and Marketing Administration and entitled "Central Fruit & Vegetable Co., and West Texas Produce Company, complainants, vs. Raymond M. Crane, doing business as Associated Fruit Distributors of California, and John C. Kazanjian, doing business as Red Lion Packing Company, respondents, PACA Docket No. 4589" and from the whole of said order; said order being signed and filed under date of April 23, 1948, and ordering appellant herein to pay to Central Fruit & Vegetable Company, the sum of \$6,133.25, with interest thereon at 5% per annum from December 10, 1944, and to pay to West Texas Produce Company the sum of \$10,112.16, with interest thereon at 5% per annum, from December 10, 1944, until paid, and dismissing said complaint and proceeding as to respondent Ray-

*Page numbering appearing at foot of page of original Certified Transcript of Record.

mond M. Crane, doing business as Associated Fruit Distributors of California.

Dated: May 10, 1948.

/s/ JOHN C. KAZANJIAN,
Doing Business as Red Lion
Packing Co., Appellant.

/s/ G. L. AYNESWORTH,
/s/ RALPH MORADIAN,
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 21, 1948. [3]

[Title of District Court and Cause.]

PETITION SETTING FORTH PROCEEDINGS
BEFORE THE SECRETARY OF AGRICULTURE,
AND GROUNDS UPON
WHICH PETITIONER RELIES TO DEFEAT
RIGHT OF COMPLAINANTS TO
RECOVER DAMAGES CLAIMED

(Perishable Agricultural Commodities
Act of 1930)

To: The Honorable Judges of the United States
District Court, for the Southern District of
California, Central Division:

The Petition of John C. Kazanjian, doing business as Red Lion Packing Company, respectfully shows:

1. That petitioner is an individual doing business under the firm name and style of Red Lion Packing Company, having his place of business at Exeter, California, and licensed under the Perishable Agricultural Commodities Act of 1930 as a dealer, commission merchant and/or broker.

2. That during all times herein mentioned, Raymond M. [4] Crane was an individual doing business under the firm name and style of Associated Fruit Distributors of California, having his place of business at Los Angeles, California, and was licensed under the Perishable Agricultural Commodities Act of 1930, as a dealer, commission merchant and/or broker.

3. That complainant, Central Fruit & Vegetable Co., is a copartnership composed of Joe Mosesman, Morris Lipshitz and Sylvia Schwartz, whose post office address is 2009 Cadiz Street, Dallas, Texas. That complainant, West Texas Produce Company, was at all times mentioned herein a partnership consisting of Harry Bockstein, Sam Lipshitz, Solomon Taylor and Leo Lipshitz, whose post office address is 801 Vickery Street, Forth Worth, Texas.

That during all times mentioned herein, the Southwest Brokerage Company, Fruit and Vegetable Division, by Jay Margules, broker, act as broker for complainants.

Proceedings Before Secretary of Agriculture

4. That on October 21, 1944, the complainants herein filed an informal complaint against the re-

spondents, and on January 22, 1946, a formal complaint was filed against both of said respondents before the Regulatory Division of the United States Department of Agriculture.

5. In the formal complaint, it is alleged that the complainants suffered damage in the sum of \$16,575.00 by reason of the failure of respondents to deliver 10 cars of Emperor grapes as agreed on in writing.

6. Copies of said formal complaint were served upon Raymond M. Crane and John C. Kazanjian, and thereafter and within the time allowed by law, answers to said complaint were filed by said respondents.

7. That on April 3, 1946, a report of investigation under the Perishable Agricultural Commodities Act was filed pursuant to Section 47.7 of the Rules of Practice for carrying [5] out the provisions of the Perishable Agricultural Commodities Act. No answers were filed to said report by any of the parties to said proceeding.

8. On January 24, 1947, an order was made designating John S. Griffin as hearing examiner in said proceedings.

9. The depositions of Harry Bockstein and Jay Margules were taken on behalf of complainants and thereafter filed in said proceeding.

10. A hearing on said proceedings was held before John S. Griffin on February 19, 1947, at Los

Angeles, California, at which time complainants appeared by Joe Mosesman, one of the partners, and by Manuel J. Hoppenstein, their attorney; and Raymond M. Crane appeared in person and by his attorney, Henry O. Wackerbarth, and John C. Kazanjian appeared in person, and by his attorneys, G. L. Aynesworth and Ralph Moradian.

11. Thereafter, and on April 23, 1948, Thomas J. Flavin, as Judicial Officer, signed and filed a Preliminary Statement, Findings of Fact, Conclusions and Order in said proceeding, wherein the Secretary of Agriculture ordered said proceeding dismissed as to Raymond M. Crane, doing business as Associated Fruit Distributors, and ordered John C. Kazanjian to pay the reparations hereinabove referred to.

Issues Presented by the Complaint and Answers Thereto

12. The complaint charged that by telegraphic communication, respondents, with Crane acting for himself and as agent for Kazanjian, agreed to sell to complainants ten cars of grapes, to be delivered from storage on December 10, 1944, for an aggregate sales price of \$27,625.00, f.o.b. shipping point, Exeter, California. It is charged that respondents failed to carry out said contract, and failed to deliver said grapes, and that thereby complainants [6] suffered loss and damage in the sum of \$16,575.00, being the difference between the contract price and the market value of the grapes at the time respondents were required to make delivery.

13. Raymond M. Crane in its answer denied that it acted as a principal or an agent for Red Lion in the transaction, and alleged that it contracted to procure grapes for complainants as their agent and was to receive compensation of \$50.00 per carload.

14. John C. Kazanjian in its answer denies that it contracted to sell grapes to complainants as alleged, and denies that Associated (Raymond M. Crane) acted as its agent in negotiating any contract with complainants; he denies that anyone was authorized to issue on behalf of Red Lion the memorandum of sale relied upon by complainants. Kazanjian alleges that if there was any agreement and a breach, complainants' duty was to minimize the damages by making replacements on the open market and the quoted price shortly after the alleged breach was \$3.00 per lug, f.o.b. shipping point.

By way of affirmative defense, Kazanjian alleges there was no signed memorandum pertaining to the alleged contract as required by Sections 1624a and 1724 of the Civil Code of California; that Associated had no authority in writing to enter into a written contract with the complainants or with any other person as agent of Red Lion as required by Section 2309 of the Civil Code of California; and that Red Lion did not receive a copy of the memorandum of sale. Kazanjian demands that complainants be required to elect as to which respondent they will proceed against and prays that the action be dismissed as against Red Lion. Kazanjian denies

that complainants have been damaged in any sum whatsoever, and alleges that complainants have not performed as required of them by the contract, if there is a contract. [7]

Grounds Upon Which John C. Kazanjian Relies to Defeat Right of Complainants to Recover Dam- ages Claimed

The grounds upon which John C. Kazanjian relies to defeat the right of complainants to recover damages claimed, are as follows:

1. That John C. Kazanjian was not a party to any transaction between Raymond M. Crane and the complainants herein, and is not liable for any default, failure or breach on the part of Crane, if there was any default, failure or breach.

2. That Raymond M. Crane was not the agent of the appellant, John C. Kazanjian, in any transaction, and had no authority to act for him, or to negotiate any contracts on his behalf, and that there was no ratification of any contract, or purported contract, entered into by Crane.

3. That the alleged agreement of sale, as evidenced by the standard memorandum of sale, is for the sale of goods, wares and merchandise, not manufactured by the seller especially for the buyer, of a value in excess of \$500.00; that the buyer did not accept and actually receive same or any part thereof, nor give anything in earnest to bind the contract or in part payment thereof, and no note

or memorandum in writing was signed by Raymond M. Crane, or John C. Kazanjian, or by an agent in behalf of either of them, and said memorandum of sale is not enforceable by action under the laws of California, or Texas.

4. That under the terms of said memorandum of sale, no contract was contemplated until a copy of said memorandum had been received by both seller, and buyer; and that if Kazanjian is to be considered as a seller, he received no copy of said memorandum, and had no opportunity to reject the terms thereof, as provided in said memorandum of sale.

5. That complainants failed to minimize damages as required by law. [8]

6. That no agreement was consummated for the sale of grapes between any of the parties to this proceeding.

7. That demand was made upon complainants to elect as to which respondent they would proceed against to judgment, and no election was made, and that by law they are foreclosed from having judgment against respondent for their failure to so elect.

Wherefore, John C. Kazanjian, doing business as Red Lion Packing Company, prays that said proceeding be tried de novo before the above-entitled Court and that upon said retrial the same be dismissed as to him, and for such other and

further relief as may seem just and proper in the premises.

Dated at Fresno, California, this 10th day of May, 1948.

/s/ JOHN C. KAZANJIAN,
Doing Business as Red Lion
Packing Co., Appellant.

/s/ G. L. AYNESWORTH,
/s/ RALPH MORADIAN,
Attorneys for Appellant.

State of California,
County of Fresno—ss.

John C. Kazanjian, being first duly sworn, deposes and says: I am the appellant in the above-entitled proceeding; I have read the foregoing petition and know the contents thereof, and the same is true of my own knowledge.

/s/ JOHN C. KAZANJIAN.

Subscribed and sworn to before me this 10th day of May, 1948.

[Seal] /s/ RALPH MORADIAN,
Notary Public in and for Said
County and State.

Affidavits of Service by Mail attached.

[Endorsed]: Filed May 21, 1948. [9]

LETTER RE PROCEEDINGS
DOCKET No. 4598 PACA

United States Department of Agriculture
Office of the Solicitor
Washington, D. C.

July 26, 1948

Registered Mail

Mr. Edmund L. Smith, Clerk
United States District Court
Southern District of California
Los Angeles 12, California

Dear Mr. Smith:

Subject: Central Fruit and Vegetable Company
and West Texas Produce Company v. As-
sociated Fruit Distributors of California,
and Red Lion Packing Company (PACA
Docket No. 4589)—Civil Action No.
8244-PH

This acknowledges receipt of copies of notice of appeal, petition for appeal, and bond, filed in your court on May 21, 1948, by John C. Kazanjian, doing business as Red Lion Packing Co., through G. L. Aynesworth and Ralph Moradian, attorneys, in the case of Central Fruit and Vegetable Company and West Texas Produce Company v. Associated Fruit Distributors of California, and Red Lion Packing Company (PACA Docket No. 4589), a proceeding under the Perishable Agricultural Commodities Act, 1930, as amended.

In accordance with the requirements of section 7 (c) of the act, there are enclosed copies of the complaint with exhibits Nos. 1 to 6, inclusive, attached; answer of respondent John C. Kazanjian, doing business as Red Lion Packing Company; answer of respondent Raymond M. Crane, doing business as Associated Fruit Distributors of California; and preliminary statement, findings of fact, conclusions, and order, dated April 23, 1948, issued by the Judicial Officer, Mr. Thomas J. Flavin. These copies are certified by the Associate Solicitor.

It will be appreciated if you will send us a copy of the decision in this case, whether reported or unreported, as soon as the case is decided in the District Court.

Very truly yours,

/s/ CLARENCE H. GIRARD,

Chief, Marketing Division.

Enclosures-5

[Endorsed]: Filed July 30, 1948. [10]

PLAINTIFFS' EXHIBIT No. 1

PACA Docket No. 4589a Proceeding Had Under
the Perishable Agricultural Commodities Act

United States of America
Department of Agriculture
8244-PH

July 19, 1948

Pursuant to Title 28, Section 661, U. S. Code
(Section 882, Revised Statutes of the United
States), I hereby certify:

1. That there are now in this Department the
following-described documents:

Complaint in PACA Docket No. 4589 entitled
Central Fruit & Vegetable Company and West
Texas Produce Company, Complainants, v.
Raymond M. Crane dba Associated Fruit Dis-
tributors of California and John C. Kazanjian
dba Red Lion Packing Company, Respond-
ents," with exhibits Nos. 1 to 6, inclusive, at-
tached;

Answer of respondent John C. Kazanjian,
dba Red Lion Packing Company;

Answer of respondent Raymond M. Crane,
dba Associated Fruit Distributors of Cali-
fornia; and

Preliminary Statement, Findings of Fact,
Conclusions, and Order, dated April 23, 1948,
by Thomas J. Flavin, Judicial Officer.

2. That true, correct, and compared copies
thereof are attached hereto.

Plaintiffs' Exhibit No. 1—(Continued)

By direction of the Secretary of Agriculture, and in witness whereof, the said copies are hereby authenticated, the seal of the Department of Agriculture is affixed hereto, and I have signed my name hereto on the day and year first above written.

[Seal] /s/ CHARLES W. BUCY,
Associate Solicitor. [11]

United States of America, Before
The War Food Administrator

P.A.C.A. Docket No. 4589

CENTRAL FRUIT & VEGETABLE COMPANY
AND WEST TEXAS PRODUCE COM-
PANY,

Complainants,

vs.

RAYMOND M. CRANE dba ASSOCIATED
FRUIT DISTRIBUTORS OF CALIFOR-
NIA AND JOHN C. KAZANJIAN dba RED
LION PACKING COMPANY,

Respondents.

COMPLAINT

To the Said Honorable Department:

Come now the complainants and respectfully complaining of the respondents, show the following:

1.

That complainant, Central Fruit and Vegetable

Plaintiffs' Exhibit No. 1—(Continued)

Company, is a partnership composed of Joe Mosesman, Morris Lipshitz and Sylvia Schwartz, dba Central Fruit & Vegetable Company, whose Post Office Address is 2009 Cadiz Street, Dallas, Texas, and that the complainant, West Texas Produce Company, is a partnership composed of Harry Bockstein and Sam Lipshitz, dba West Texas Produce Company, whose Post Office Address is 801 West Vickery, Fort Worth, Texas.

2.

That complainants are informed and believe that respondent, Raymond M. Crane, is an individual dba Associated Fruit Distributors of California, whose Post Office Address is Los Angeles, California, and that the respondent, John C. Kazanjian, is an individual dba Red Lion Packing Company whose Post Office Address is Exeter, California.

3.

That respondents are licensed or subject to the license under the Perishable Agricultural Commodities Act of 1930 as a [12] dealer, commissioned merchant and/or broker, according to complainants information and belief.

4.

On or about October 3, 1944, in the course of interstate commerce, respondents, by contract in writing by telegraph contemplating the shipment of the commodity in interstate commission, contracted to sell to complainants ten carloads of government in-

Plaintiffs' Exhibit No. 1—(Continued)

spected U. S. No. 1 emperor grapes, 28 pounds net, being a perishable agricultural commodity, at the agreed price of \$2.50 f.o.b. plus \$.03½ per lug brokerage to Southwest Brokerage Company; that the standard lug pack per carload is 1,105 lugs, and aggregating a total sales price of \$27,625.00 f.o.b. shipping point, Exeter, California; that California was the shipping point and the final destination was six cars to Fort Worth, Texas, and four cars to Dallas, Texas, being six cars for the complainant, West Texas Produce Company, and four cars for the complainant, Central Fruit & Vegetable Company; that the complainants were also to pay \$50.00 per car buying service for the respondent, Associated Fruit Distributors of California, plus \$.03½ per lug brokerage to Southwest Brokerage Company, Fruit and Vegetable Division, Dallas, Texas; that said delivery to be made by respondent, Red Lion Packing Company, on and after December 10, 1944, with the shipper to place said commodities in storage about October 9, 1944, with the shipper to pay all storage charges; that said contract of sale was confirmed by the respondent, Associated Fruit Distributors of California, on October 2, 1944, by wire addressed to Southwest Brokerage Company as per Exhibit No. 1, attached hereto and made a part hereof; that the memorandum of sale agreement with complainants was dated October 3, 1944, and delivered to complainants by the Southwest Brokerage Company as per Exhibit No. 2, attached hereto and

Plaintiffs' Exhibit No. 1—(Continued)

made a part hereof as though fully incorporated herein.

5.

That said contract was negotiated by Jay Margules dba [13] Southwest Brokerage Company, Fruit and Vegetable Division, a broker, located at Dallas, Texas, who acted in negotiating such purchase as agent for both complainants and respondents and that the respondent, Associated Fruit Distributors of California, was acting for and on behalf of itself and as agent for and on behalf of the respondent, Red Lion Packing Company.

6.

That thereafter respondents failed, neglected and refused to ship from loading point in the State of California in interstate commerce to complainant, Central Fruit and Vegetable Company at Dallas, in the State of Texas, and to the West Texas Produce Company at Fort Worth, in the State of Texas, the ten carloads of emperor grapes called for in said contract and advised and informed the complainants that they would not deliver said grapes for the contract price.

7.

That the matters and action set forth herein constitute a violation by respondents of Section 2 of the Perishable Agricultural Commodities Act of 1930.

8.

That on account of respondents failure to make

Plaintiffs' Exhibit No. 1—(Continued)

delivery of the perishable agricultural commodity above specified in accordance with said contract of sale and purchase, complainants suffered loss and were damaged in the sum of \$16,575.00, being the difference between what said commodity was contracted for and the market value of said commodity at the time respondents were required to make delivery, to-wit, on or about December 10, 1944, and in this connection complainants say that the reasonable cash market value of U. S. No. 1 emperor grapes of the type and kind contracted for was \$4.00 f.o.b. California plus storage; that complainants, acting by and through Joe Mosesman, one of the partners of Central Fruit & Vegetable Company, prior to December 10, 1944, and after notification of the breach by the [14] shippers, made diligent effort to obtain quotations for delivery of the commodity involved for December 10, 1944, but was unable to obtain confirmation for ten cars but only confirmation for one which was shipped by Heggblade-Marguleas Company, San Francisco, California, on January 24, 1945, and consisted of 1,125 lugs at a total cost for the car, exclusive of freight, of \$3,865.00; that in attempting to minimize damage complainant, West Texas Produce Company, on January 14, 1945, purchased 150 lugs of the type of grapes involved in this complaint at \$4.00 per lug on the Dallas market; that again West Texas Produce Company purchased 1,098 lugs of U. S. No. 1 emperor grapes on January 22, 1945, from Zaninovich Brothers, Orange Grove, California, through

Plaintiffs' Exhibit No. 1—(Continued)

C. H. Robinson Company, Brokers, at a price of \$5.00 per lug, delivered at a total cost of \$5,490.00 for the car, the freight being \$518.84; that again on January 19, 1945, West Texas Produce Company purchased from Western Fruit Growers, Inc., one carload of U. S. No. 1 emperor grapes containing 1,105 lugs at \$4.25 per lug, totalling \$4,696.25, the said car being divided 553 lugs to complainant, Central Fruit & Vegetable Company, and 552 lugs to West Texas Produce Company; that again West Texas Produce Company purchased one car of U. S. No. 1 emperor grapes containing 1,100 lugs from Nash DeCamp Company, Berkeley, California, for shipping December 11, 1944, at \$3.50 per lug, aggregating \$3,850.00, plus storage charges of \$156.25, and that, accordingly, in minimizing damages complainants have purchased a total of 4,578 lugs at a total cost of \$18,138.66, exclusive of freight, and that under the contract price the cost of such grapes at \$2.50 per lug would aggregate \$11,445.00, resulting in a net actual loss and damage to complainants of \$6,693.66, being the actual increased cost of the grapes actually purchased to complainants and which loss and damage was actually sustained and being damage other than the difference in value between the contract price and the market price for date of delivery, to-wit, December 10, 1944, and as evidence of the market on or [15] about December 10, 1944, complainants request that judicial notice be taken of the Market News Reports and attach as exhibits and made a part hereof as though

Plaintiffs' Exhibit No. 1—(Continued)

fully incorporated herein Exhibit No. 3, copy of quotation from Associated Fruit Distributors of California by wire, dated December 11, 1944, and Exhibit No. 4, being circular of respondent, Associated Fruit Distributors of California, dated December 9, 1944, and Exhibit No. 5, Western Union wire from Federal State Market News Service to Central Fruit & Vegetable Company, dated December 15, 1944, and Exhibit No. 6, wire from Nash DeCamp Company to C. H. Robinson Company, quoting price of \$4.00 plus storage.

9.

Complainants' Exhibits 1-6, inclusive, are true copies and are attached hereto as a part of this complaint.

Wherefore, complainants pray that a copy of this complaint be served upon the above-named respondents and that they be required to answer the charges herein stated in writing within such time as the Administrator may require; that, upon the records made either with or without formal hearing as provided in the Act or in the regulations and by appropriate order, the complainants be awarded such amount of damages as they may be entitled to receive according to the facts established; and that the Administrator also make such other and further orders and take such disciplinary action contemplated by Section 8 of the Act as may be deemed fit and proper in the premises.

Plaintiffs' Exhibit No. 1—(Continued)

Signed at Dallas, Texas, this 31 day of December, 1945.

WEST TEXAS PRODUCE
COMPANY,

By /s/ HARRY BOCKSTEIN,
Partner,

CENTRAL FRUIT &
VEGETABLE COMPANY,

By /s/ JOE MOSESMAN,
Partner,
Complainants.

/s/ J. MANUEL HOPPENSTEIN,
Counsel for Complainants.

State of Texas,
County of Dallas—ss.

Joe Mosesman, being first duly sworn, says that he has read the foregoing complaint and knows the contents thereof and that the same is true except as to matters therein stated on information and belief and as to such matters he believes it to be true and that he is duly authorized to sign the complaint on behalf of the complainant, Central Fruit and Vegetable Company.

/s/ JOE MOSESMAN.

Plaintiffs' Exhibit No. 1—(Continued)

Subscribed and sworn to before me this 31st day of December, 1945.

[Seal] HAWKINS GOLDEN,
Notary Public, Dallas
County, Texas.

State of Texas,
County of Tarrant—ss.

Harry Bockstein, being first duly sworn, says that he has read the foregoing complaint and knows the contents thereof and that the same is true except as to matter therein stated on information and belief and as to such matters he believes it to be true and that he is duly authorized to sign the complaint on behalf of the complainant, West Texas Produce Company.

/s/ HARRY BOCKSTEIN.

Subscribed and sworn to before me this 31st day of December, 1945.

[Seal] PATSY JENNINGS,
Notary Public, Tarrant
County, Texas.

Plaintiffs' Exhibit No. 1—(Continued)

Exhibit No. 1

Western Union

[Telegram]

Western Union Telegraph Co.

(Copy)

Oct. 2

DJ53 NL PD-WUX Los Angeles, Calif.

Southwest Brokerage Co.

Secured Redlyon Packing Company Confirmation Ten Cars Grapes as Outlined. You Collect Deposits to Be Forwarded to Us Soons Dupja Wired Each Car.

ASSOCIATED FRUIT DISTRS
OF CALIF.

824A

Plaintiffs' Exhibit No. 1—(Continued)

Exhibit No. 2

Southwest Brokerage Co.

Fruit and Vegetable Division

202-4 Produce Exchange Bldg.

Phone R-5144

Standard Memorandum of Sale

Date Ordered: 10/3/44

Lot No. 726 thru 735

Check How Sold:

In Person.....

Telephone Harry Bockstein

Telegram Joe Mosesman

Letter.....

When the terms of sale have been agreed upon the broker shall fill out this Standard Memorandum of Sale in triplicate, sending one copy to the seller, one to the buyer and retaining the third copy for his own file. Unless the seller or the buyer makes immediate objection upon receipt of his copy of this Standard Memorandum of Sale, showing that contract was made contrary to authority given the Broker, he shall be conclusively presumed to agree that the terms of sale as set forth herein are fully and correctly stated.

Date.....19....

City: Dallas, Tex.

Sold to: West Texas Produce Co., Ft. Worth. (6 cars)

Plaintiffs' Exhibit No. 1—(Continued)

Ship to: Central Fruit and Produce, Dallas. (4 cars) Destination

Advise:

Railroad Delivery Preferred:

Positive Routing: SP TP on both buyers.

Sold for account of (Seller) Associated Fruit Dist. of Los Angeles, Calif., (a/c Red Lyon Pkg. Co.)

Shipment from: California.

Time of shipment: See below.

Rolling Car:

Car No. and Initial: Later.

How Shipped or to be Shipped: Std. refgn.

Style of Equipment: Refrigerator Car x Box Car
Ventilated Car Stock Car

Sale made (F. O. B. or Delivered): fob acceptance final,

Terms, How Payable: draft West Texas thru First Nat'l Bank, Ft. Worth.

Special Agreement, if any: draft Central Fruit thru Mercantile Bank, Dallas.

(It is understood, unless otherwise stated herein, this sale is made in contemplation of and subject to the Standard Rules and Definitions of Trade Terms printed on the back hereof.)

Quantity	Commodity and Specifications	Price
Ten (10)	Cars Government Inspected	US#1
	Emperor Grapes 28# Net @ 2.50 fob plus 50.00	
	buying service for Associated, plus our brokerage	
	31½ lug.	

Plaintiffs' Exhibit No. 1—(Continued)

(To go Into Storage, Packing to Commence Rate of One or Two Daily Starting About October 9th. Shipper to Transfer Title on or After December 10th, Shipper Pays all Storage Charges. New Lidded Display Lugs, "Calripe" or Comparable Brand, Partial Payment 1000.00 Per Car to Be Made by Buyers With Government Inspection Report Each Car.)

"Thank You"

SOUTHWEST BROKERAGE
COMPANY, FRUIT & VEG.
DIVN.

/s/ JAY MARGULES,
Broker.

Exhibit No. 3

Associated Fruit Distributors of California
1231 East Seventh Street, 7th and Central Avenue,
Los Angeles 21, California

R. M. Crane, Manager

Representing: Growers, Shippers.

December 9, 1944

Associated Reporting . . .

Navels: Demand exceeds supply. Interesting to note Central California has moved to December 2nd only 7% of their crop, compared to 25% the same date last season. This accounts for the fact that shippers in California have been unable to supply

Plaintiffs' Exhibit No. 1—(Continued)

their customers with Navels for Christmas. Now booking shipments car weekly starting next week for a period of two or three weeks, or for season Tulare County, first grade label, naked pack, natural run of sizes, weather permitting, ceiling price delivered net. Sizes are running heavy 176's to 220's.

Grapefruit: Loading next week about five cars from Phoenix and Yuma districts. Packing under "Valley of the Sun" and "Yumazona" brands. Sizes are running heavy 80's and 70's and some larger. Arrivals indicate fruit to be very nice quality and market remains active at ceiling prices which is \$2.86 f.o.b.

Lemons: Loading next week two or three cars from Riverside district, packing under "Cal-Crest" label, sizes heavy to 360's, 432's, few smaller, some larger. Market still remains active at ceiling prices.

Sweets: Loading from Arizona few cars next week, packing under "Valley of the Sun" brand, sizes running heavy to 220's, 288's, and quality is reported beautiful. Packing these unwrapped, and market is ceiling, which figures the same as the orange ceiling.

Emperors: Can load next week 2-3 cars of U.S. #1 from storage, subject to ability to make grade, \$4.15 f.o.b. net. Terms will be f.o.b. acceptance final.

Tomatoes: Barring any adverse weather, Mexican tomatoes should step up to around fifty cars daily

Plaintiffs' Exhibit No. 1—(Continued)

average, starting the middle of next week. Prices \$4.00 f.o.b. cash, net, all sizes, and anything grading 80% U.S.#1 or better. Sizes running heavy 6x7's.

Cauliflower: Shipments continue light, demand very good, heavy 12's. Los Angeles district \$1.65. Santa Maria district \$1.50 to \$1.60.

Celery: Very little Golden Heart available. This mostly coming from Delta, and ordinary quality, small sizes. Finest celery now offering from Exeter district, Pascal, Howard crates, 16". Heavy 3-3½, \$3.35 f.o.b.

Lettuce: Most all offerings very ordinary, very light weight. Market still at ceiling, demand exceeds supply. Both our Imperial and Blythe deals will get under way around the 20th, with good quality ice pack.

Shafter Longwhite Potatoes: We will be offering futures on this commodity starting from here on. At present growers are asking ceiling which we understand is \$2.93 May 1st to 15th, \$2.83 May 16th to 31st, and \$2.63 during June. This is on Size A, U.S.#1.

Yours very truly,

ASSOCIATED FRUIT DIS-
TRIBUTORS,

R. M. CRANE,

F. C. MORGAN,

C. J. SMITH.

All Quotations Subject to Confirmation

Plaintiffs' Exhibit No. 1—(Continued)

Exhibit No. 4

Western Union

[Telegram]

(Copy)

Los Angeles, Calif., Dec. 11, 1944.

Jimmie Teel

Ft. Worth

Referring to Our Circular of the 9th not Sure
but Think Owner Willing Confirm 4.00 Emperors
Subject Immediate Reply. Offer Subject Packers
Confirmation Crossed Saturday Mexicanita Brand
#2 Mexican Tomatoes 125 6/6 3.50 365 6/7 3.00 160
7/7 2.50 Duty Paid Border FOB Acceptance Final
Duty Crossing Extra 61139.

ASSOCIATED FRUIT DIS-
TRIBUTORS OF CALIF.

Exhibit No. 5

Western Union

[Telegram]

DA35

DD.LB787 DL Collect—San Francisco, Calif. 15
204P

Central Fruit & Veg. Co.

DAL

1944 Dec. 15 P.M. 4:52

No Official Grape FOB Reports Being Issued but
Several Shippers Say Selling USOne Emperors

Plaintiffs' Exhibit No. 1—(Continued)

Around December Tenth 3.75-4.00 Plus Storage and
in Transit Charges Some 4.00 Storage Paid.

FEDERAL STATE MARKET
NEWS SERVICE.

Exhibit No. 6

Western Union

WU J11 NL Pd-Berkeley, Calif., Dec. 17, 1944.

C. H. Robinson Co.

Answering We Made Sale Pep Brand Emperors
on December Thirteenth 4.00 F.O.B. Plus All Stor-
age Charges and Extras Also on December Fifth
and Sixth We Also Made Sales at the Same Price.
No Sales Were Made in Between as We Had Noth-
ing to Sell but if We Had We believe Could Have
Sold at Same Price.

NASH DECAMP COMPANY.

This is original message received over Western
Union printer in our office a.m. 12/18/44

C. H. ROBINSON CO.

/s/ FRANK D. SIMS.

Received Jan 22, 1946 U. S. Dept. of Agriculture.

Plaintiffs' Exhibit No. 1—(Continued)

United States of America
Before The War Food Administration
PACA Docket No. 4589

CENTRAL FRUIT & VEGETABLE COMPANY
AND WEST TEXAS PRODUCE COMPANY,
Complainants,

vs.

RAYMOND M. CRANE dba ASSOCIATED
FRUIT DISTRIBUTORS OF CALIFORNIA
and JOHN C. KAZANJIAN dba RED LION
PACKING COMPANY,

Respondents.

ANSWER OF RESPONDENT
JOHN C. KAZANJIAN

Comes now the respondent John C. Kazanjian, doing business as Red Lion Packing Company, and answering the amended complaint of complainant herein, admits, denies and alleges as follows, to wit:

1. Denies each and every allegation contained in Paragraph 4 of said complaint, and in connection therewith alleges the fact to be that this answering respondent did not, on October 3, 1944, or at any other time, by contract in writing, or otherwise, contemplating the shipment of a commodity in interstate commerce, contract to sell complainants, or either of them, ten carloads of U. S. No. 1 Emperor grapes, 28 pounds net, at an agreed price of \$2.50 f.o.b. plus \$0.31½ per lug brokerage; nor did re-

Plaintiffs' Exhibit No. 1—(Continued)

spondent agree to sell complainants, or either of them, any merchandise, perishable or otherwise, at any time; nor did answering respondent enter into or negotiate any agreement of any kind whatsoever. Answering respondent further denies that the standard lug pack per carload is 1,105 lugs, but states that a carload may consist of as little as 888 lugs of grapes. Answering respondent further states that he knows nothing of, and authorized no one to execute on his behalf, the memorandum of sale agreement attached to the complaint herein.

2. Defendant (answering respondent) denies the allegations contained in Paragraph 5 of said complaint that Jay [23] dba Southwest Brokerage Company, acted as agent in any manner for this respondent in negotiating any purchase or contract, and also denies that the respondent, Associated Fruit Distributors of California, was acting for and on behalf of, or as agent for, the respondent Red Lion Packing Company in any negotiations whatsoever.

3. Answering respondent admits the allegation in Paragraph 6 of said complaint that he failed to make any shipments to the complainants from California to Texas, and states in this connection that he had no contract or obligation of any kind to make delivery of any grapes of any kind to complainants.

4. Answering respondent denies each and every allegation contained in Paragraphs 7 and 8 of said

Plaintiffs' Exhibit No. 1—(Continued)

complaint. In this connection, answering respondent alleges that if complainants were damaged by the failure of any person to deliver grapes according to any agreement, it was their duty to minimize said damages by purchasing similar grapes on the open market at a time when said grapes could be purchased for considerably less than the dates at which purchases were made by complainants as alleged in said complaint. And, further in this connect, answering respondent alleges that at the time, and shortly after the alleged breach set forth in the complaint, No. 1 Emperor grapes were being quoted on the open market at \$3.00 per lug f.o.b.

And by Way of a First Affirmative Defense to Said Amended Complaint, Answering Respondent Alleges:

That the alleged contract upon which the action of the complainants was brought is for the sale of goods for the price of \$500.00 or more, and that the complainant has not accepted or received any part of the said goods, and has not given anything in part payment, and that there is no note or memorandum in writing of the said alleged contract or bargain made and signed by the answering respondent, as required under Sections 1624a and 1724 of the Civil Code of the State of California. [24]

And by Way of a Second Affirmative Defense to Said Complaint, Answering Respondent Alleges:

That respondent Raymond M. Crane, doing busi-

Plaintiffs' Exhibit No. 1—(Continued)

ness as Associated Fruit Distributors of California, had no authority in writing to enter into any alleged written contract with complainants, or any other person, as the agent of the answering respondent, which written authority is required under Section 2309 of the Civil Code of the State of California.

And by Way of a Third Affirmative Defense to Said Complaint, Answering Respondent Alleges:

That answering respondent did not receive any copy of the Standard Memorandum of Sale referred to in complainant's complaint, under the terms of which he, the answering respondent, if deemed to have been the seller, could have made immediate objection that said contract was made contrary to authority, if any, given the broker.

And by way of a Fourth Affirmative Defense to Said Complaint, Answering Respondent Alleges:

That if it be determined that respondent Raymond M. Crane was the agent of the complainant herein, an allegation which this answering respondent denies, the purported agreement entered into by said Raymond M. Crane with the complainants, as evidenced by the said Standard Memorandum of Sale, and subsequent telegraphic communications, said agreement was entered into without any auth-

Plaintiffs' Exhibit No. 1—(Continued)

ority, written or otherwise, from the answering respondent.

And by Way of a Fifth Affirmative Defense to Said Complaint, Answering Respondent Alleges:

That the complainants did not perform, and have not performed, terms of said agreement on their part agreed to be performed, and did not offer or tender to perform or to make payment as in said agreement required of them. [25]

And the Answering Respondent Hereby Demands:

That the complainants in the above-entitled proceeding immediately elect, as between Raymond M. Crane, doing business under the name and style of Associated Fruit Distributors of California, and John C. Kazanjian, doing business as Red Lion Packing Company, against which respondent they will proceed to judgment, if any.

Wherefore, respondent John C. Kazanjian prays that complainants take nothing by reason of their complaint, but that answering respondent be dismissed with his costs.

Signed at Fresno, California, this 27th day of May, 1946.

RALPH MORADIAN,
Attorney for Respondent
John C. Kazanjian.

Received May 31, 1946 U. S. Dept. of Agriculture. [26]

Plaintiffs' Exhibit No. 1—(Continued)

United States of America
Before the Secretary of Agriculture
P. A. C. A. Docket No. 4589

CENTRAL FRUIT & VEGETABLE COMPANY
AND WEST TEXAS PRODUCE COM-
PANY,

Complainants,

vs.

RAYMOND M. CRANE dba ASSOCIATED
FRUIT DISTRIBUTORS OF CALIFORNIA
AND JOHN C. KAZANJIAN dba RED LION
PACKING COMPANY,

Respondents.

ANSWER TO COMPLAINT

Comes now the respondent, Raymond M. Crane
dba Associated Fruit Distributors of California,
who makes the following answer to complaint:

1.

Allegation No. 1 is neither admitted nor denied.

2.

Allegation No. 2 is admitted.

3.

Allegation No. 3 is admitted.

4.

Allegation No. 4 is denied in so far as it applies

Plaintiffs' Exhibit No. 1—(Continued)

to this respondent, in that this respondent contracted to procure for complainants' account rather than to sell to complainants the ten carloads of Emperor grapes, and was to receive compensation of \$50.00 per car from complainants, and that this respondent was acting as agent for complainants and that by reason of this fact this respondent is not properly a party to this complaint.

5.

Allegation No. 5 is denied in that this respondent was not as set forth acting for itself and as agent for Red Lion Packing Company, but on the contrary was acting as agent for complainants.

6.

Allegation No. 6 is denied on behalf of this respondent. [27]

7.

Allegation No. 7 is denied on behalf of this respondent.

8.

Allegation No. 8 is denied on behalf of this respondent.

9.

Allegation No. 9 calls for neither admission nor denial.

It is respectfully submitted on behalf of this respondent that all of the evidence submitted by complainants, together with exhibits attached to and a part of Report of Investigation clearly es-

Plaintiffs' Exhibit No. 1—(Continued)

tablish the fact that this respondent was acting in capacity of procuring agent for complainants and was to be compensated for its services solely by them, with no anticipation of compensation or profit from any other source; this is clearly established by complainants' Exhibit No. 1, being a telegram from this respondent to Southwest Brokerage Company, Dallas, Texas:

“Secured Red Lion Packing Company Confirmation Ten Cars Grapes as Outlined You Collect Deposits to Be Forwarded to Us Soon Dupja (Government Inspection) Wired Each Car.”

Wherefore, this respondent respectfully prays that this complaint be dismissed in so far as it relates to this respondent.

In the event of adverse ruling oral hearing is requested by this respondent.

/s/ RAYMOND M. CRANE,

Associated Fruit Distributors
of California.

State of California,
County of Los Angeles—ss.

Raymond M. Crane, being first duly sworn, says that he has read the foregoing answer to complaint and knows the contents thereof and that the same is true except as to matters stated on information and belief and as to such matters he believes it to

Plaintiffs' Exhibit No. 1—(Continued)

be true and that he is duly authorized to sign this answer to complaint.

/s/ RAYMOND M. CRANE.

Subscribed and sworn to before me this 22nd day of April, 1946.

[Seal] /s/ DEAN KUGLER,
Notary Public.

My Commission expires Oct. 14, 1947.

Received April 20, 1946, U. S. Dept. of Agriculture. [28]

United States Department of Agriculture
Washington, D. C.

Before the Secretary of Agriculture
PACA Docket No. 4589

CENTRAL FRUIT & VEGETABLE COMPANY
and WEST TEXAS PRODUCE COMPANY,
Complainants,

vs.

ASSOCIATED FRUIT DISTRIBUTORS OF
CALIFORNIA and RED LION PACKING
COMPANY,

Respondents.

PRELIMINARY STATEMENT, FINDINGS OF
FACT, CONCLUSIONS, AND ORDER

Preliminary Statement

This is a proceeding for the recovery of reparation under the Perishable Agricultural Commodi-

Plaintiffs' Exhibit No. 1—(Continued)

ties Act, 1930 (7 U.S.C. 1940 ed. 499a, et seq.). On October 21, 1944, an informal complaint was filed against Raymond M. Crane, an individual doing business as Associated Fruit Distributors of California, hereinafter referred to as Associated, and John C. Kazanjian, an individual doing business as Red Lion Packing Company, hereinafter referred to as Red Lion. A formal complaint was filed against both respondents on January 22, 1946. A copy of the formal complaint, together with a copy of the report of investigation, was served upon Associated on April 16 and upon Red Lion on April 18, 1946. Associated [29] filed an answer on April 30, 1946, and on the following day an answer was filed by Red Lion.

It is alleged in the complaint that on or about October 3, 1944, respondents agreed, by telegraphic communications, to sell to complainants ten carloads of U. S. No. 1 Emperor grapes at \$2.50 per lug f.o.b. Exeter, California; that complainants were to pay 3½ cents per lug brokerage to Southwest Brokerage Company and \$50 per car buying service to Associated; that delivery was to be made by Red Lion on or after December 10, 1944; and that the shipper was to place the grapes in storage about October 9 and was to pay all storage charges. It is further alleged that six carloads were purchased for the account of West Texas Produce Company, and four carloads for the account of Central Fruit & Vegetable Company; that the contract was negotiated by J. Margules, doing business at Dallas,

Plaintiffs' Exhibit No. 1—(Continued)

Texas, as Southwest Brokerage Company, who acted as agent for both the complainants and Associated; and that Associated was acting for and on behalf of itself and as the agent of Red Lion. Complainants allege further that respondents failed and refused to ship the 10 carloads of grapes pursuant to the contract, whereupon complainants made diligent efforts to obtain replacements and did replace part at a total cost of \$18,138.66, which was \$6,693.66 in excess of the contract price for that portion. [29A] The total loss claimed is \$16,575. They seek reparation for such amounts as they may be entitled to, based on the facts.

Associated denies in its answer that it acted as a principal or an agent for Red Lion in the transaction. This respondent alleges that it contracted to procure the grapes for complainants as their agent and was to receive compensation of \$50 per carload.

In answer to the formal complaint, Red Lion denies that it contracted to sell grapes to complainants as alleged; that Southwest Brokerage Company or Associated acted as its agent in negotiating any contract with the complainants; or that anyone was authorized to issue on behalf of Red Lion the memorandum of sale relied upon by complainants. Red Lion alleges that if there was any agreement and a breach, complainants' duty was to minimize the damages by making replacements on the open market and the quoted price shortly after the alleged breach was \$3 per lug, f.o.b. shipping point. By way of affirmative defenses, Red Lion alleges that there

Plaintiffs' Exhibit No. 1—(Continued)

was no contract or signed memorandum pertaining to the alleged contract as required by Sections 1624a and 1724 of the Civil Code of California; that Associated had no authority in writing to enter into a written contract with the complainants or with any other person as agent of Red Lion as required by Section 2309 of the Civil Code of California; and that Red Lion [30] did not receive a copy of the memorandum of sale. This respondent demands that complainants be required to elect as to which respondent they will proceed against and prays that the action be dismissed as against Red Lion.

A formal hearing was held at Los Angeles on February 19, 1947, at which all parties were represented.

Associated Fruit Distributors of California is owned and operated by Raymond M. Crane at Los Angeles, California. He is a broker and distributor of produce. Red Lion Packing Company is the trade name of John C. Kazanjian, who owns vineyards and a packing house at or near Visalia, California. In telephone conversations beginning in September, 1944, and extending to October 3, 1944, Associated and Red Lion discussed the selling of grapes for Red Lion. On September 26, 1944, Crane sent telegrams to 13 brokerage concerns in the United States relating to the purchase of grapes. One recipient was Southwest Brokerage Company and that telegram reads, in part, as follows:

“Can Book Emperors Nine Cars Usone Nine
Cars Unclassified or 18 Cars Vineyard-Run

Plaintiffs' Exhibit No. 1—(Continued)

Grade to Go Into Storage Packing to Commerce
Rate of One or Two Daily October 9th We to
Personally Inspect AFOHD [shipping point
acceptance final] Basis Our Inspection Shipper
to Transfer Title on or After December 10th
He Paying All Storage Charges. Packed 28#
Net Display New Lugs Lidded Calripe or Com-
parable Brand 500.00 Part Payment With
Confirmation Price 2.53 Net to Shipper Which
Ceiling That Time We Charging 50.00 Car
Procurement Charge ADLAM [offer subject to
confirmation] CORLU [wire immediately must
have answer by] Thursday." [31]

This was followed by telegrams on October 2 to
the same brokerage concerns, including Southwest
Brokerage Company, as follows:

"CPFGD [referring our night letter 26th]
Quoting Futures Emperors Secured Revised
Deal Fifteen Cars Usone 2.50 Net Same Deal
CORSD [wire quick if wanted] Any Part."

On October 2 Southwest Brokerage Company sent
a message to Associated by teletype:

"Refg That 6 Emps Ftw and 4 Dallas Deal
OK 2.50 Net 5. 50.00 for U if Legal. Presume
Its Legal or U Wouldnt Offer It. Advise."

Associated replied:

"Hvnt Bn Able Contact the Shpr Yet But
Sure Its Okay. Wl Wire U Def One Way or
Other Sons Get Him. Yes It Is Legal Natu-

Plaintiffs' Exhibit No. 1—(Continued)
 rally a Receiver Can Pay His Whole Markup
 for Buying Brokg if He Wants to Wl Wire
 U Soons Rec Def Conf. Undertnd Its Basis
 1000.00 Dep Against Each Usone Inspn as
 They R Loaded. What Else New."

Southwest Brokerage Company answered:

"Fars I Kno That Covers It. Try Wire Nite
 Sure Thx End."

At 5:25 p.m., October 2, Associated sent the following telegram to Southwest Brokerage Company:

"Secured RedLyon Packing Company Confirmation Ten Cars Grapes as Outlined You Collect Deposits to Be Forwarded to Us Soons DUPJA [Government inspection] Wired Each Car." [32]

The only written matter exchanged between Associated and Red Lion consists of two telegrams. The first telegram, dated October 3, 1944, and addressed to Red Lion, is as follows:

"Referring Telephone Have Sold for Your Account Basis 2.50 Lug Net to You Block Emperors Mentioned Five Cars Basis 750.00 Car Deposit Ten Cars Basis 1000.00 Deposit to Be Paid Upon Receipt Usone Government Inspections Now Depending You Handle Through Us Balance Cars You Mentioned for Fresh Shipment Advise When Expect Ship These Believe We Could Place Them Now Ceiling Pricdxxx Price With Deposits Selling Basis Ability Make Usone Grade Suggest Give Us

Plaintiffs' Exhibit No. 1—(Continued)

Approximate Shipping Dates Mays Well Get Cleaned Up Since Ceiling Precludes Any Possibility Higher Market Time of Shipment Will Forward Confirmation for Your Signature Soons Receive Airmail From Buyers."

On October 4, 1944, Red Lion sent the following reply:

"Fifteen Cars Storage U S One Emperors December Tenth Conversion Satisfactory at Two Dollars and Fifty Cents FOB Exeter Guaranty by Buyer. One Thousand Dollars Deposit on 10 Cars and Seven Hundred Fifty Dollars on Five Cars Said Deposit to Be Paid Immediately on Inspection at Shipping Point. You to Arrange for Storage as Agreed. Balance of Pack Intend to Load After Oct Twentieth Will Be Glad to Make Deal on Same About the 15th of Oct."

Joe Mosesman, who was at the time of the alleged agreement a partner in Central Fruit & Vegetable Company, testified in part that he was contacted by Margules of Southwest Brokerage Company and informed that telegrams had been received from Associated offering grapes for sale. The witness stated further that he agreed to buy four carloads for his company and, under proper authority, six carloads for West Texas Produce Company. He states that on October 2 he knew that Red Lion was the seller. [33]

The deposition of Margules was placed in the

Plaintiffs' Exhibit No. 1—(Continued)

record by complainants. He acknowledged the telegrams and teletype messages exchanged with Associated. The witness testified that he dealt entirely with Crane of Associated and he did not know Red Lion and had no previous business dealings with that concern. He testified further that all of the shipper's specifications were met, and a standard broker's memorandum of sale was prepared and copies were forwarded to Associated, Mosesman, and Harry Bockstein, a partner in West Texas Produce Company. The memorandum, dated October 3, 1944, shows the name of the seller as "Associated Fruit Dist. of Los Angeles, Calif. (a/c Red Lyon Pkg. Co.)." According to Margules, he learned on October 10 that the ceiling price on grapes had been removed by the Office of Price Administration; that he telegraphed Associated asking if some cars of grapes could be shipped at once; and that Associated replied that Red Lion considered that: "Account Ceiling Lifted Any Contracts Emperors Voided; Willing Go Along Give You Trade Preference Shipping as Packed at Market Price Which Today 3.25 F.O.B. Acceptance. Advise." On October 12 Associated notified Margules by telegraph that Red Lion as a final gesture would ship the grapes at \$3 f.o.b., but would not guarantee U.S. No. 1 on arrival, and on October 16 Associated notified him that Red Lion was [34] unwilling to abide by the terms of the original contract and complainants should take whatever action they felt advisable.

Plaintiffs' Exhibit No. 1—(Continued)

Findings of Fact

1. The complainant, Central Fruit & Vegetable Company, at all times pertinent hereto was a partnership composed of Joe Mosesman, Morris Lipshitz, and Sylvia Schwartz, whose post office address is 2009 Cadiz Street, Dallas, Texas.

2. Complainant, West Texas Produce Company, was at all times pertinent hereto a partnership consisting of Harry Bockstein, Sam Lipshitz, Solomon Taylor, and Leo Lipshitz, whose post office address is 801 Vickery Street, Fort Worth, Texas.

3. Respondent, Raymond M. Crane, is an individual doing business as Associated Fruit Distributors of California, whose post office address is 1231 East Seventh Street, Los Angeles, California. Respondent, John C. Kazanjian, is an individual doing business as Red Lion Packing Company, whose post office address is 125 South G Street, Exeter, California. At the time of the transactions involved in this proceeding, both respondents were licensed under the act.

4. At 9:10 a.m., on October 2, 1944, Associated sent a telegram, on behalf of Red Lion, to 13 brokerage concerns, including [35] Southwest Brokerage Company, Dallas, Texas, referring to a prior communication of September 26, 1944, and quoting 15 carloads of U.S. No. 1 Emperor grapes at \$2.50 per lug net, subject to the shipper's confirmation.

5. On or about October 2, 1944, Red Lion orally

Plaintiffs' Exhibit No. 1—(Continued)

authorized Associated to confirm the sale of 10 of the 15 carloads to complainants—6 to West Texas Produce Company, 4 to Central Fruit & Vegetable Company. It was understood and agreed that the grapes were to be U.S. No. 1 grade, 28 pounds net in new lidded display lugs, "Calripe" or other comparable brand; that the price was \$2.50 per lug f.o.b. acceptance final; that the grapes were to go into storage with packing to commerce at the rate of one to two carloads daily starting October 9; and that Red Lion was to transfer title on or after December 10, and was to pay all storage charges. It was agreed further that Government inspection reports as to grade would be wired on each car and upon their receipt complainants would make a deposit of \$1,000 per carload. Complainants agreed to pay 3½ cents per lug brokerage to Southwest Brokerage Company and \$50 per car to Associated for its services in procuring the grapes.

6. On October 3 Associated notified Red Lion by telegram that the sales of the 10 carloads of grapes here involved had [36] been completed, and the following day Red Lion replied by telegram that this was satisfactory.

7. On October 10, 1944, Southwest Brokerage Company wired Associated requesting shipment of some of the 10 cars of grapes immediately instead of placing them in storage, to which Associated replied that "Red Lion Takes View Account Ceiling Lifted Any Contracts Emperors Voided."

Plaintiffs' Exhibit No. 1—(Continued)

8. On October 16, 1944, Associated advised Southwest Brokerage by wire that Red Lion was unwilling to abide by any sales made where the ceiling price was a definite consideration; that the crop was short; that they were not packing U.S. No. 1 grapes, and that this appeared to be a case for the courts to decide, with the further suggestion that complainants take such action as they deemed advisable.

9. Complainants made a diligent effort to secure replacements of grapes after being informed that Red Lion would not ship or store the grapes as provided in their agreement. A total of 4,428 lugs were purchased at prices totaling \$17,382.41 f.o.b. shipping points. This was \$6,312.41 more than the cost of the same number of lugs at the contract price of \$2.50 per lug. The number of lugs of grapes purchased by each complainant, including the price and approximate dates, were as [37] follows:

Central Fruit

Date	Number	Price
10/24/44	1,125	\$3,865.00
1/15/45	553	2,350.25

West Texas Produce

Date	Number	Price
10/31/44	1,100	\$3,850.00
1/15/45	552	2,346.00
1/22/45	1,098	4,971.16

Plaintiffs' Exhibit No. 1—(Continued)

10. The agreement entered into between Red Lion and complainants contemplated the delivery of 10 cars of grapes, consisting of 11,050 lugs, based on the standard carload of 1,105 lugs to the car. At the contract price of \$2.50 per lug, the total cost would have been \$27,625. The number of lugs covered by the contract exceeded by 6,622 the number of lugs which complainants were able to replace.

11. The fair market price of U.S. No. 1 Emperor grapes on or about December 10, 1944, at Exeter, California, was \$4 per lug. The market value of the 6,622 lugs of grapes not replaced exceeded the contract price by \$9,933.

12. Informal complaint was filed in this proceeding on October 21, 1944, which was within nine months after the cause of action accrued, and was followed by the filing of a formal complaint on January 22, 1946.

Conclusions

In this proceeding much discussion was devoted to the question whether Associated was the agent of Red Lion or of complainants. [38] The evidence demonstrated that Associated, with the knowledge and consent of Red Lion, attempted to find purchasers of 15 carloads of grapes and Associated did find that complainants were willing to purchase 10 carloads. At the oral hearing Kazanjian testified that most of his grapes were handled by Crane during the 1944-45 season and also the previous year. Before the advent of Federal ceiling prices on table grapes and after their removal on October 10, 1944,

Plaintiffs' Exhibit No. 1—(Continued)

an intermediary or broker received brokerage from the seller and Kazanjian paid brokerage to Crane. During the period of ceiling prices, however, the general practice was for buyers to pay the brokerage. As to the instant transaction, Kazanjian stated that three or four weeks prior to October 3, 1944, Crane called Kazanjian and asked if he was going to put any grapes in storage and the latter said he would be interested if Crane could work out a storage deal. Thereafter Crane talked with Kazanjian almost daily concerning the matter and Kazanjian was visited regularly by Hoover, Crane's representative. Kazanjian admits that Crane told him in these conversations that he had located storage facilities and had also found buyers willing to pay the price, which was the ceiling, and assume the risk of storage. Kazanjian understood that one transaction was for 10 carloads with a deposit of \$1,000 per car to be made upon the receipt of the results of Federal inspections, but Crane did not mention the names of the buyers. [39]

The ordinary function of a broker is to handle negotiations between contracting parties. Although a broker may be initially the limited agent of one party, he becomes the agent also of the other party when permitted to transmit offers or counter-offers for them. *Vahlsing v. Rothstein*, 107 Pa. Sup. 281, 163 Atl. 350 (1932). The fact that one of the parties is to pay the broker's commission does not necessarily mean that the broker acts solely as agent for that party. *Harcourt-Greene Co. v. Pennsylvania*

Plaintiffs' Exhibit No. 1—(Continued)

Marconi Co., 6 A.D. 257 (PACA Docket No. 4523, S. 3356).

The most important and perhaps the only real issue here is whether a contract was made which is enforceable under the California Statute of Frauds. Respondent contends in its brief that Associated had no authority to bind Red Lion by any agreement in writing and that there is no memorandum of the agreement signed by Red Lion. In respect to these matters, Red Lion refers to the California statutes. Sections 1624(a) and 1724 of the California Civil Code and Section 1973(a) of the California Code of Civil Procedure are the same and read as follows: "A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards shall not be enforceable by action unless * * * some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf." Section 2309 of the California Civil Code provides: "* * * authority to [40] enter into a contract required by law to be in writing can only be given by an instrument in writing."

Unquestionably, a memorandum of sale under the statutes is valid and enforceable only when it is in writing and there is a sufficient description of the thing sold, the price to be paid, and the names of the party selling and the party buying. The statutes do not require, however, a formal contract drawn up with technical exactness and the memorandum need not be found in one paper, but may consist of

Plaintiffs' Exhibit No. 1—(Continued)

a number of documents, including telegrams and letters. *O'Donnell v. Lutter*, 68 Cal. App. 376, 156 P. 2d 958 (1945); *Simmons v. Birge Co.*, 52 F. Supp. 629 (S.D. Calif., 1943). In *Brewer v. Horst-Lachmund Co.*, 127 Cal. 643, 60 Pac. 418 (1900), it was stated that: “* * * the court is permitted to interpret the memorandum by the light of all the circumstances under which it was made; and if, when the court is put into possession of all the knowledge which the parties to the transaction had at the time, it can be plainly seen from the memorandum who the parties to the contract were, what the subject of the contract was, and what were its terms, then the court should not hesitate to hold the memorandum sufficient.” *Gibson v. De La Salle Institute*, 66 Cal. App. 2d 609, 152 P. 2d 774 [41] (1944).

The telegrams and teletype messages exchanged between Associated and Southwest Brokerage Company clearly show that a contract was entered into between Red Lion and complainants. Although the complainants were not specifically named therein, the evidence is that the letters “FW” and “Dallas” designated them. Furthermore, a memorandum of sale containing the names of the contracting parties was drawn up by Southwest Brokerage Company and forwarded to Associated, and it may be considered a part of the memorandum of the agreement. From these integrated papers appear every essential element of a memorandum to satisfy the requirements of the statutes. *Kelley-Clarke Co. v. Leslie*, 61 Cal. App. 559, 215 Pac. 699 (1923).

Plaintiffs' Exhibit No. 1—(Continued)

It is conceded that Red Lion did not sign any of the foregoing documents constituting the memorandum of the agreement and the authority of Associated to send the confirming telegram is not in writing. Crane testified, by deposition, that he received authority from Kazanjian over the telephone to confirm the sale to complainants. Complainants urge that Red Lion recognized Associated's authority by ratification, referring to the telegram sent by Red Lion to Associated on October 4, 1944. As to the ratification of an agent's authority, the California Supreme Court stated in *Ballard v. Nye*, 138 Cal. 588, 72 Pac. 156 (1903) that: [42]

“Of course authority must be shown, but it need not be express authority; it may be implied and one of the recognized legal methods of proving authority is by ratification. From such proofs the law implies previous authority to the same extent as if in the first instance it had been expressly conferred. The doctrine of ratification proceeds upon the theory that there was no previous authority, and that the relation of principal and agent did not in fact exist, but implies it from the acts and conduct of the parties, and when so implied, is equivalent to previous authority, and results as effectively to establish the relations of principal and agent as if the agency had been authorized in the beginning.”

In *Dunbar v. Farnum*, 109 Vt. 313, 196 Atl. 237, 114 A.L.R. 996 (1937), the court said: “Such a rati-

Plaintiffs' Exhibit No. 1—(Continued)

fication need not be a formal document. It need not be addressed or delivered to the other party to the contract. If it recognizes the existence of the contract and either expressly or impliedly approves it, the Statute of Frauds is satisfied." And in *Central Sav. Bank of Oakland v. Coulter*, 72 Cal. App. 78, 236 Pac. 956 (1925), the court stated: "In all such cases where the agency is shown to exist, the rule is that the writings showing ratification will be liberally construed."

On October 3 Associated notified Red Lion that 15 carloads of grapes had been sold and mentioned a previous telephone conversation between them. In a reply telegram, Red Lion stated that the matter was satisfactory, referring to the 10 carloads on which [43] deposits of \$1,000 were to be made. Kazanjian admits that he sent this telegram and that he intended that Crane should rely thereupon. This exchange of telegrams constituted a ratification by Red Lion of the sale of the 10 carloads of grapes to complainants. *Kelley-Clarke Co. v. Leslie*, supra; *O'Donnell v. Lutter*, supra; cf. *E. K. Wood Lumber Co. v. Moore Mill & Lumber Co.*, 97 F. 2d 402 (C.C.A. 9th, 1938). This conclusion is substantiated to a slight extent by the conduct of the parties after the removal of the ceiling prices. In the telegram dated October 10, Associated told Southwest Brokerage Company that "Shipper RedLion Takes View Account Ceiling Lifted Any Contracts Emperors Voided"; not that Red Lion considered no contracts had been consummated.

Plaintiffs' Exhibit No. 1—(Continued)

Red Lion contends further that its telegram of October 4 could not have been a ratification because a copy of the broker's memorandum of sale issued by Southwest Brokerage Company was not sent to Red Lion, although it contains the purported terms, and there are variances between Red Lion's telegram and this memorandum. This argument must fail because it is based upon the theory that the broker's memorandum is the only evidence of a memorandum available under the statutes. As we have seen, however, the statutory memorandum is considered to consist of the telegrams and other documents. The California statutes do not require that any particular [44] form of memorandum be used. Likewise the statutes do not require that the memorandum be delivered and the weight of authority is that a delivery is unnecessary. 145 A.L.R. 1014.

The following conclusions are warranted by the evidence in the record: Prior to October 2, 1944, Kazanjian knew that Crane was negotiating to find purchasers for 10 carloads of grapes to be stored by Kazanjian; on or about October 2, 1944, Kazanjian was notified orally by Crane that purchasers for the grapes had been found who would contract on terms satisfactory to Kazanjian and the latter orally authorized Crane to confirm the contract of purchase and sale; there was a memorandum of sale signed by Associated on behalf of Red Lion which is sufficient to satisfy the California Statutes of Fraud; the authority vested in Crane to confirm

Plaintiffs' Exhibit No. 1—(Continued)

the sale was subsequently ratified by Red Lion in writing; valid and enforceable contracts were made between Red Lion and complainants; and Red Lion's refusal to ship the 10 carloads of grapes to complainants pursuant to such contracts was in breach thereof.

Respondent Red Lion places considerable emphasis upon the decision in *Joseph Denunzio Fruit Company v. Associated Fruit Distributors of California and Red Lion Packing Company*, 6 A.D. 139 (PACA Docket No. 4532, S. 3336). Without going into a detailed analysis of that case in relation to the facts here [45] presented, it is sufficient to say that there are material differences in the two cases, and the Denunzio decision is not decisive of the issues presented in this proceeding.

Subdivision (2) of Section 1787 of the California Civil Code [Uniform Sales Act, Section 67(2)] provides that the measure of damages in case of wrongful refusal to deliver goods "is the loss directly and naturally resulting in the ordinary course of events, from the seller's breach of contract." Ordinarily, the rule of damages is the difference between the price agreed to be paid and the market value at the time or times when the goods ought to have been delivered, because the vendee can obtain the goods contracted for at the market price. *Bercut v. Park, Benziger & Co.*, 150 F. 2d 731 (C.C.A. 9th, 1945); *S. Botner & Sons, et al. v. The Login Corp.*, 6 A.D. 567 (PACA Docket Nos. 4503 and 4504, S. 3383).

Plaintiffs' Exhibit No. 1—(Continued)

Complainants were first informed on October 16, 1944, that no grapes would be shipped to them under the contracts herein, which provided for delivery on or after December 10, 1944. The evidence shows that complainants were diligent in their efforts to replace the 10 carloads of grapes after receiving notice that the grapes would not be stored or shipped. The first purchase was made on or about October 24, 1944, when 1,125 lugs of grapes [46] were purchased by Central Fruit & Vegetable Company for delivery December 11, 1944. Altogether a total of 4,428 lugs were purchased by complainants from outside sources of supply. This figure does not include a purchase by West Texas Produce Company from Central Fruit of 150 lugs at a cost of \$600. The notation of this purchase which was submitted in evidence fails to show whether the price was f.o.b. or delivered and, in addition, these lugs appear to have been a portion of the 1,125 lugs purchased by Central Fruit on October 24, 1944, at \$3.25 per lug f.o.b.

There is testimony to the effect that a standard car consists of about 1,105 lugs of grapes. This is denied by Red Lion, who claims that a carload of grapes may consist of as little as 888 lugs. The four cars of grapes that were purchased by complainants averaged 1,107 lugs. An average of 1,105 lugs per car, therefore, appears to be a reasonable figure to use in computing the extent of complainants' damages. Based on this figure the contracts entered into between complainants and Red Lion cover 11,050

Plaintiffs' Exhibit No. 1—(Continued)

lugs of grapes, 4,420 by Central Fruit and 6,630 by West Texas.

Reports of the Market-News Service for November 10, 1944, of which we take official notice, state no further reports would be made on grapes in California since the grape season was practically over at that time. Several witnesses testified with reference to [47] the market price of U. S. No. 1 Emperor grapes on or about December 10, 1944. The price ranged from \$4 per lug to \$5.50 per lug. It was Crane's opinion that the fair market price on or about December 10, 1944, would be around \$4 per lug. Associated published a bulletin on December 9, 1944, which was circulated to the fruit and vegetable trade throughout the country, quoting among other items a market price of \$4.15 f.o.b. net per lug for U. S. No. 1 Emperor grapes. It is concluded, therefore, that the fair market price of U. S. No. 1 Emperor grapes on December 10, 1944, the delivery date in the contract between Red Lion and complainants, was approximately \$4 per lug, f.o.b. California.

Central Fruit contracted to purchase from Red Lion four carloads, or 4,420 lugs, of grapes, none of which was delivered. This complainant made replacement purchases of 1,678 lugs at a cost of \$6,215.25, which was \$2,020.25 in excess of the contract price. The value of the 2,742 lugs not replaced, based upon market value of \$4 per lug, was \$4,113 in excess of the contract price. Central Fruit's total damages resulting from Red Lion's failure to de-

Plaintiffs' Exhibit No. 1—(Continued)

liver thus amounted to \$6,133.25 (\$2,020.25 plus \$4,113).

The number of lugs to be delivered by Red Lion to West Texas Produce was 6,630, none of which was delivered. Replacement purchases totaled 2,750 lugs at a cost of \$11,167.16, which was [48] \$4,292.16 in excess of the contract price. The value of the 3,880 lugs not replaced was \$15,520, which was \$5,820 in excess of the contract price. West Texas Produce thus sustained total damages in the amount of \$10,112.16 (\$4,292.16 plus \$5,820).

It is concluded that the failure of John C. Kazanjian, doing business as Red Lion Packing Company, to deliver the 10 carloads of grapes to complainants was without reasonable cause and in violation of Section 2 of the act, for which reparation should be awarded to Central Fruit & Vegetable Company in the amount of \$6,133.25, with interest, and to West Texas Produce Company in the amount of \$10,112.16, with interest, and the facts should be published. The complaint filed against Raymond M. Crane, doing business as Associated Fruit Distributors of California, should be dismissed.

Associated and Southwest Brokerage Company appear to have fully performed the duties required of them by complainants in effecting the purchase from Red Lion. When complainants are indemnified for the breach of Red Lion, they will be obligated to pay Associated and Southwest Brokerage Company for services rendered at the rates agreed [49] upon.

Plaintiffs' Exhibit No. 1—(Continued)

Order

Within 30 days from the date of this decision, John C. Kazanjian, doing business as Red Lion Packing Company, shall pay to complainant Central Fruit & Vegetable Company, as reparation, the sum of \$6,133.25, and shall pay to complainant West Texas Produce Company, as reparation, the sum of \$10,112.16, with interest on each amount awarded at the rate of 5 per cent per annum from December 10, 1944, until paid.

The complaint against Raymond M. Crane, doing business as Associated Fruit Distributors of California, is hereby dismissed.

The facts as set forth herein shall be published.

Copies hereof shall be served on the parties by registered mail, or in person, and, except as to the date of payment of reparation and as to service on the parties, this order shall become effective 20 days after its date.

Done at Washington, D. C., this 23rd day of April, 1948.

Secretary's File Room

/s/ THOMAS J. FLAVEN,
Judicial Officer.

[Endorsed]: Filed July 30, 1948, U. S. District Court.

Admitted in evidence (Plaintiffs' Exhibit No. 1 in case No. 8244, U. S. District Court) July 11, [50] 1950.

[Title of District Court and Cause.]

AMENDED ANSWER OF RESPONDENT AND
APPELLEE RAYMOND M. CRANE, DO-
ING BUSINESS AS ASSOCIATED FRUIT
DISTRIBUTORS OF CALIFORNIA

Leave of Court being first had and obtained or counsel for complainants and appellants having stipulated to the filing of this amended answer, respondent and appellant Raymond M. Crane, doing business as Associated Fruit Distributors of California, files this, his amended answer to the complaint of complainants on file herein, admitting, denying and alleging as follows:

I.

Answering the allegations contained in Paragraphs 1, 2 and 3 of [52] said complaint, this answering respondent admits the allegations contained therein.

II.

Answering the allegations contained in Paragraphs 4, 5, 6, 7 and 8 of said complaint, this answering respondent denies, generally and specifically, each and every allegation contained therein except as such allegations may hereinafter be admitted.

Wherefore, this answering respondent prays judgment, etc.

And as a Second, Separate and Distinct Defense to the Cause of Action Set Forth in the Complaint of Complainants and Appellees, This Answering Respondent and Appellee Alleges:

I.

That in connection with the transactions alleged in Paragraphs 4, 5, 6, 7 and 8 of said complaint, this answering respondent alleges that he did not act as the principal or seller, or as an agent for the principal or seller, but that on the contrary he was the procuring broker or buying agent for the complainants, and that said complainants agreed to pay this answering respondent the sum of \$50.00 per car as a procurement charge or buying brokerage, and that in said transactions the respondent John C. Kazanjian, doing business as Red Lion Packing Company, was the principal or seller.

Wherefore, this answering respondent prays judgment, etc. [53]

And as a Third, Separate and Distinct Defense to the Cause of Action Set Forth in the Complaint of Complainants and Appellees, This Answering Respondent Alleges:

I.

That in connection with the transactions alleged in Paragraphs 4, 5, 6, 7 and 8 of said complaint, this answering respondent alleges that he submitted to the respondent John C. Kazanjian, doing business as Red Lion Packing Company, the offer of

complainants to purchase said 10 cars of Emperor grapes, and the said respondent John C. Kazanjian accepted said offer and thereafter ratified in writing the sale of 10 cars of Emperor grapes to complainants.

Wherefore, this answering respondent prays judgment, etc.

And as a Fourth, Separate and Distinct Defense to the Cause of Action Set Forth in the Complaint of Complainants and Appellees, This Answering Respondent Alleges:

I.

That in connection with the transactions alleged in Paragraphs 4, 5, 6, 7 and 8 of said complaint, this answering respondent alleges that the terms of the contract for the purchase of 10 cars of Emperor grapes were never definitely agreed upon.

Wherefore, this answering respondent prays judgment, etc. [54]

And as a Fifth, Separate and Distinct Defense to the Cause of Action Set Forth in the Complaint of Complainants and Appellees, This Answering Respondent Alleges:

I.

That the transactions alleged in Paragraphs 4, 5, 6, 7 and 8 of said complaint were for the purchase of 10 cars of Emperor grapes at a purchase price in excess of \$500.00; that said alleged agreement,

if any, was consummated in the State of California; that the buyer did not, at any time, accept and receive all or any part of said grapes; that no payment was made in earnest or to bind said agreement of purchase, and no part payment was made on account of the purchase price of said grapes, and no note or memorandum in writing was made of said contract of sale and signed by the party to be charged or his agent in that behalf, and said alleged agreement of sale of 10 cars of Emperor grapes was unenforceable under the provisions of Section 1624a of the Civil Code of California.

Wherefore, this answering respondent prays judgment, etc.

And as a Sixth, Separate and Distinct Defense to the Cause of Action Set Forth in the Complaint of Complainants and Appellees, This Answering Respondent Alleges:

I.

That the agreement for the purchase of 10 cars of Emperor grapes alleged in Paragraphs 4, 5, 6, 7 and 8 of said complaint, was at a purchase price in excess of \$2.50 a lug, and said alleged agreement of purchase was therefore at a price in excess of the ceiling price of \$2.50 per lug established by the Office of Price Administration pursuant to the provisions of the Emergency Price Control Act of 1942 as amended, and said alleged agreement for the purchase of 10 [55] cars of Emperor grapes was therefore illegal and void.

II.

That this defense is presented upon the assumption that in the transactions alleged in Paragraphs 4, 5, 6, 7 and 8 of said complaint this answering respondent was acting either as the principal or as the agent for the respondent John C. Kazanjian, doing business as Red Lion Packing Company, and upon the further assumption that an agreement of purchase and sale was entered into by the complainants as purchaser and by this respondent as principal or by respondent John C. Kazanjian as principal, and this defense is presented without prejudice to the contention urged in other defenses herein to the effect that in said transactions this answering respondent was acting as the procuring broker or buying agent for the complainants.

Wherefore, this answering respondent prays judgment that the complainants take no relief under the cause of action set forth in said complaint, and that this answering respondent have judgment for his costs and disbursements herein incurred.

/s/ HENRY O. WACKERBARTH,
Attorney for Respondent, Raymond M. Crane, Do-
ing Business as Associated Fruit Distributors.

State of California,
County of Los Angeles—ss.

Raymond M. Crane, being first duly sworn, deposes and says: I am one of the respondents in the above-entitled action and I have read the foregoing

Amended Answer and know the contents thereof and the same is true of my own knowledge.

/s/ RAYMOND M. CRANE.

Subscribed and sworn to before me this 18th day of September, 1949.

[Seal] /s/ DOROTHY WALD FIERRO,
Notary Public in and for
Said County and State.

My commission expires June 28, 1953.

[Endorsed]: Filed Oct. 25, 1949.

[Title of District Court and Cause.]

PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above-entitled action came on regularly for trial on the 11th day of July, 1950, before the above-entitled Court, in courtroom No. 3 thereof, Hon. Peirson M. Hall, Judge presiding, the complainant and appellee, West Texas Produce Company, appearing by Harry Bockstein, one of the partners, and both complainants and appellees appearing by J. Manuel Hoppenstein, of Dallas, Texas, and Harry A. Pines, of Los Angeles, California; the respondent and appellee, Raymond M. Crane, doing business as Associated Fruit Distributors of California, appearing in person and by Henry O. [166] Wackerbarth, his attorney, and the respondent and appellant,

John C. Kazanjian, doing business as Red Lion Packing Company, appearing in person and by Messrs. G. L. Aynesworth and L. Nelson Hayhurst, his attorneys; and said action proceeded to trial upon (1) the complaint of the complainants originally filed before the War Food Administrator of the United States of America; (2) the answer of the respondent, John C. Kazanjian, doing business as Red Lion Packing Company, originally filed before the War Food Administrator of the United States of America; and (3) the amended answer of respondent and appellee, Raymond M. Crane, doing business as Associated Fruit Distributors of California, filed in the above-entitled Court. Thereupon, evidence both oral and documentary was introduced on behalf of the respective parties, and the evidence being closed, the cause was submitted to the Court for its consideration and decision, and after due deliberation thereon the Court, being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law, and orders that judgment be entered in accordance therewith.

Findings of Fact

I.

The Court makes no finding with reference to the allegations contained in Paragraphs I, II and III of complainants' complaint, for the reason that said allegations are admitted by both respondents.

II.

That on and prior to the 26th day of September,

1944, the complainant, Central Fruit & Vegetable Co., was a partnership conducting and engaged in the business of handling fruit and vegetables as a commission merchant and broker, at Dallas, Texas. That the complainant, West Texas Produce Company, was a partnership [167] conducting and engaged in the business of handling fruit and vegetables as a commission merchant and broker, at Fort Worth, Texas.

That on and prior to September 26, 1944, respondent, Raymond M. Crane, doing business as Associated Fruit Distributors of California, was engaged in the produce business as a broker and car lot distributor, having his principal place of business at Los Angeles, California.

That on and prior to September 26, 1944, respondent John C. Kazanjian, doing business as Red Lion Packing Company, was engaged in the business of operating vineyards in the vicinity of Exeter, California, and operating a fruit and vegetable packing house at Exeter, California.

That on and prior to September 26, 1944, one Jay Margules was a fruit and produce broker at Dallas, Texas, doing business under the firm name and style of Southwest Brokerage Company.

III.

That upon various occasions prior to September 26, 1944, the respondent, Raymond M. Crane, had acted as broker or agent for the respondent, John C. Kazanjian, in the sale of carloads of grapes grown by said respondent in the vicinity of Exeter,

California, and packed at said Exeter packing house; that shortly prior to September 26, 1944, respondent, Raymond M. Crane, discussed with said respondent, John C. Kazanjian, the matter of the sale of grapes during the grape season of 1944. That in said conversation the said John C. Kazanjian refused to employ the said Raymond M. Crane to act as his broker or agent in the sale of said grapes for the 1944 grape season, for the reason that there was a ceiling price on grapes, established under the Federal Emergency Price Control Act, and that the market for grapes at that time was very active and the said respondent, John C. Kazanjian, did not need a broker [168] or agent to secure customers for the purchase at said ceiling prices of grapes produced and packed by him; that in said conversations the said respondent, John C. Kazanjian, informed respondent, Raymond M. Crane, that he was willing to sell grapes in carload lots, but that each sale would be a separate transaction and handled upon the terms to be agreed upon at the time of the making of such sale.

IV.

That on September 26, 1944, respondent, Raymond M. Crane, sent a form telegram to thirteen different brokers or commission agents throughout the south central part of the United States, which said telegram, including the translation of the words written in code (said translation being in parenthesis), is as follows:

“Can book Emperors nine cars usone nine cars unclassified or 18 cars vineyard-run grade to go into storage packing to commence rate of one or two daily October 9th we to personally inspect AFOHD (shipping point acceptance final) basis our inspection shipper to transfer title on or after December 10th he paying all storage charges. Packed 28# net display new lugs lidded Calripe or comparable brand 500.00 part payment with confirmation price 2.53 net to shipper with ceiling that time we charging 50.00 car procurement charge ADLAM CORLU (wire immediately, must have ans. by) Thursday. Adlas immediate UPTMV (6x6 & lgr) new crop Edison district ALBIQ (approx. 85%) 3.25 can secure 3-4 cars uninspected account running heavy puff heavy sidewalls would grade ALBIEIQ (80%-85%) except for puff which not serious defect account heavy sidewall 2.50.”

That one copy of the above telegram was sent to [169] Southwest Brokerage Company of Dallas, Texas.

Shortly after September 26, 1944, a teletype conversation occurred between respondent, Raymond M. Crane, and said Jay Margules, of the Southwest Brokerage Company, in which Margules inquired as to whether or not they would have to take all of the grapes offered or as to whether they could get someone to take a couple of cars of U. S. One grapes and a couple of cars of the unclassified grapes. In this conversation respondent, Raymond M. Crane,

suggested that Jay Margules submit an offer and he would see if he could work it out.

On October 2, 1944, respondent, Raymond M. Crane, sent out another form telegram to the thirteen brokers above referred to, which said telegram, including the translation of the words written in code (said translation being in parentheses), was and is in words and figures as follows, to wit:

“CPFGP (referring our NL 26th) quoting futures Emperors secured revised deal fifteen cars USONE 2.50 net same deal CORSD (wire quick if wanted) any part.”

One of the form telegrams of October 2 was sent to the said Southwest Brokerage Company.

After sending the form telegram of October 2, 1944, respondent, Raymond M. Crane, had a teletype conversation with the said Jay Margules in which Margules stated that a deal for ten cars of grapes (six to Forth Worth and four to Dallas) was O.K. at \$2.50 net, with \$50.00 to Crane, if legal. Respondent Raymond M. Crane replied to the effect that he was not able to contact the shipper as yet, but that he was sure it was O.K. and that he would wire Southwest Brokerage definitely one way or the other as soon as he could get hold of the shipper, and respondent, Raymond M. Crane, informed the said Jay Margules that it was legal for him to charge a procurement fee or brokerage and the said Crane called to the [170] attention of Margules that the basis of the sale was \$1,000.00 deposit against each car USONE grapes, inspection as they were loaded.

That thereafter, and on October 2, 1944, respondent Raymond M. Crane talked to the respondent, John C. Kazanjian, over the long distance telephone and informed him of the transactions which had been carried on between the said Raymond M. Crane and the said Jay Margules, and the respondent, John C. Kazanjian, informed respondent, Raymond M. Crane, that he was willing to sell fifteen cars of grapes upon the terms to be set forth in a confirmation.

That thereafter, and on October 2, 1944, respondent Raymond M. Crane sent a night letter to the Southwest Brokerage Company, reading as follows, including the translation of the words written in code (said translation being in parentheses):

“Secured RedLyon Packing Company Confirmation Ten Cars Grapes as Outlined You Collect Deposits to Be Forwarded to Us Soons JUPJA (code word for the words ‘government inspection’) Wired Each Car.”

That thereafter, and on October 3, 1944, respondent, Raymond M. Crane, sent a telegram to respondent, John C. Kazanjian, reading as follows:

“Referring Telephone Have Sold for Your Account Basis 2.50 Lug Net to You Block Emperors Mentioned Five Cars Basis 750.00 Car Deposit Ten Cars Basis 1000.00 Deposit to Be Paid Upon Receipt USONE Government Inspections Now Depending You Handle Through Us Balance Cars You Mentioned for Fresh Shipment Advise When Expect Ship These Believe We Could Place Them Now

Ceiling PriedXXX Price WithDeposits Selling Basis Ability Make USONE Grade [171] Suggest Give Us Approximate Shipping Dates Mays Well Get Cleanedup Since Ceiling Precludes Any Possibility Higher Market Time of Shipment Will Forward Confirmations for Your Signature Soons Received Airmail From Buyers.”

That thereafter, and on October 4, 1944, respondent, John C. Kazanjian, sent a telegram to respondent, Raymond M. Crane, reading as follows:

“Fifteen Cars Storage US One Emperors December Tenth Conversion Satisfactory at Two Dollars and Fifty Cents FOB Exeter Guaranty by Buyer. One Thousand Dollars Deposit on 10 Cars and Seven Hundred Fifty Dollars on Five Cars Said Deposit to Be Paid Immediately on Inspection at Shipping Point. You to Arrange for Storage as Agreed. Balance of Pack Intend to Load After Oct Twentieth Will Be Glad to Make Deal on Same About the 15th of Oct.”

On October 3, 1944, and after the said J. Margules received the night letter of October 2 above quoted, he prepared a standard memorandum of sale, showing a sale of six cars of grapes to West Texas Produce Company and four cars of grapes to Central Fruit & Vegetable Co. The memorandum states that they were sold for the account of “Associated Fruit Dist. of Los Angeles, Calif. (a/c Red Lyon Pkg. Co.)” The memorandum of sale quoted

the price at \$2.50 f.o.b. "plus 50.00 buying service for Associated," plus brokerage of 3½¢ a lug to Southwest Brokerage Company. The memorandum further stated "partial payment 1000.00 per car to be made by buyers with government inspection report each car."

That the said Jay Margules thereupon sent a copy of said memorandum of sale to Raymond M. Crane and a copy to the West Texas Produce Company and a copy to the Central Fruit & Vegetable [172] Company.

V.

The Court further finds that when the respondent, Raymond M. Crane, used the following words in his telegram of September 26, 1944, viz., "500.00 part payment with confirmation, and the code word ADLAM" (meaning "offer subject to confirmation") the said respondent, Raymond M. Crane, intended that any sale negotiated as a result of the sending of said telegram should be negotiated by a standard Confirmation of Sale.

VI.

That at all times during the months of September and October, 1944, and for many years prior thereto, persons engaged in the produce business and in selling produce in carload lots, used two different forms of written documents in connection with transactions. One of said documents was known as a "Standard Memorandum of Sale," and the other of said documents was known as "Standard Confirmation of Sale."

That under the practice existing in the produce industry a Standard Memorandum of Sale was signed by the broker negotiating a sale and a copy sent to the seller and another copy sent to the buyer.

That under the practice existing in the produce industry a Standard Confirmation of Sale is signed by the buyer and by the broker or agent for the seller, and the broker or agent signs a certificate attached thereto, stating, "I hereby certify that I am authorized by the seller named above as his broker or salesman to fill out this Standard Confirmation of Sale and sign and authenticate the same in his behalf."

VII.

In the transactions involving the proposed sale of ten carloads of grapes by respondent, John C. Kazanjian, doing business as Red Lion Packing Company, to West Texas Produce Company [173] and Central Fruit & Vegetable Co., the respondent, Raymond M. Crane, doing business as Associated Fruit Distributors of California, acted as buying broker and agent for said complainants, West Texas Produce Company and Central Fruit & Vegetable Co.

That on October 10, 1944, the carload lot ceiling price on grapes established under the Federal Emergency Price Control Act was lifted by the Office of the U. S. Price Control, and the said Southwest Brokerage Company thereupon wired said Associated Fruit Distributors of California, inquiring as to whether or not it was possible to get shipment of some of the grapes at the present time

rather than put all of same in storage, and in reply to said telegram Associated Fruit Distributors of California wired Southwest Brokerage Company as follows:

“Shipper Redlion Takes View Account Ceiling Lifted Any Contracts Emperors Voided Willing Go Along Give Your Trade Preference Shipping as Packed at Market Price Which Today 3.25 AFOHD (shipping point acceptance final) Advise.”

That on October 24, 1944, complainant, West Texas Produce Company, commenced to purchase carloads of Emperor grapes to replace the grapes which it contended it had purchased from the respondents, and on October 24, 1944, complainant, Central Fruit & Vegetable Co., commenced to purchase carloads of Emperor grapes to replace the grapes which it contended it had purchased from the respondents.

VIII.

That on October 10, 1944, and up to and including the 15th day of November, 1944, the reasonable market value of U. S. No. 1 Emperor grapes in carload lots, at or in the vicinity of Exeter, California, was \$3.25 per lug. [174]

IX.

The Court further finds that the parties to this proceeding never at any time entered into a written agreement for the sale of ten carloads of grapes by either of the respondents to either of the complainants.

The Court further finds that at no time did the West Texas or the Central Fruit ever sign or execute a written authority or authorization to Jay Margules or the Southwest Brokerage Company, or to Raymond M. Crane or the Associated Fruit Distributors authorizing said persons or institutions to buy carloads of grapes for them, or either of them.

The Court further finds that at no time did the respondent, John C. Kazanjian, doing business as Red Lion Packing Company, ever authorize in writing the said Raymond M. Crane, or the Associated Fruit Distributors of California to sell ten carloads of Emperor grapes for him, nor did the said John C. Kazanjian at any time ever execute or sign a written ratification of said proposed sale.

The Court further finds that at all times between the 26th day of September, 1944, and the 10th day of October, 1944, the ceiling price on Emperor grapes in carload lots on a sale negotiated by a packing house was \$2.50 per lug and, in this connection, the Court finds that the West Texas Produce Company and Central Fruit & Vegetable Co. proposed, agreed, or contracted to pay the sum of \$2.50 per lug to the owner of said grapes, and \$50.00 a car brokerage to Associated Fruit Distributors of California, and 31½c a lug commission to Southwest Brokerage Company. In this regard the Court finds that said West Texas Produce Company and Central Fruit & Vegetable Co. proposed, agreed or contracted to pay in connection with said proposed sale or sales, a sum of money in excess of the selling

price as established under the Federal Emergency Price Control Act. [175]

X.

The Court further finds that the statements and representations made by the said Raymond M. Crane, dba Associated Fruit Distributors of California to the said J. Margules and the Southwest Brokerage Company were not false or fraudulent, and were not made with any intention to defraud said Southwest Brokerage Company or the said Jay Margules or the West Texas Produce Company or the Central Fruit & Vegetable Co.

John C. Kazanjian's, doing business as Red Lion Packing Company, transactions were all had entirely within the State of California. He did not in any manner communicate with any person or have any transactions with any person outside the State of California nor have any agent carry on any such transactions for him.

That the parties never, at any time, finally agreed upon any terms of a contract for the sale of ten carloads of grapes or any larger or less number of carloads of grapes; that there was no meeting of minds of the parties as to the terms of the proposed sale; that John C. Kazanjian was, at all times during their negotiations, at or near Exeter, California.

Conclusions of Law

1. That the telegrams sent by Crane to Margules required that any contract entered into should be confirmed in writing by the parties to

the proposed contract and in particular John C. Kazanjian at Exeter, California.

2. That respondent Kazanjian never accepted the terms proposed by Margules and his telegram of October 4th to Crane was never accepted by Margules or the complainants.

3. That no binding contract could have been entered into by Margules or Crane on behalf of the complainants unless the authority to Margules and Crane was in writing, as the law of [176] California required that such contracts be in writing.

4. That assuming there was a binding agreement on the part of complainants to buy and Kazanjian to sell ten carloads of grapes, the complainant acquiesced in the repudiation of said contract on October 24, 1944, by contracting to purchase, or purchasing grapes, to replace the grapes covered by the Kazanjian contract, and the measure of damages would arise as of October 24, 1944.

5. That the respondent Crane did not misrepresent to the said Margules or the complainant any facts with reference to the contract in question or the proposed contract, and the statements or representations by Crane were not fraudulent and no liability arose on the part of Crane for the statements or representations made by him to Margules or the complaint.

6. That the above-entitled action should be dismissed as to the respondent John C. Kazanjian, doing business as Red Lion Packing Company.

7. That the above-entitled action should be dismissed as to the respondent Raymond M. Crane, doing business as Associated Fruit Distributors of California.

Let judgment be entered accordingly.

Dated this 11th day of October, 1950.

/s/ PEIRSON M. HALL,
Judge.

Disapproved as to Form:

J. MANUEL HOPPENSTEIN
and
HARRY A. PINES,

By /s/ HARRY A. PINES,
Attorneys for Complainants
and Appellees.

Approved as to Form:

/s/ HENRY O. WACKERBARTH,
Attorney for Respondent and
Appellee.

Receipt of Copy acknowledged.

[Endorsed]: Filed Oct. 11, 1950. [177]

In the District Court of the United States, Southern
District of California, Central Division

No. 8244 PH

CENTRAL FRUIT & VEGETABLE CO., and
WEST TEXAS PRODUCE COMPANY,
Complainants and Appellees,

vs.

ASSOCIATED FRUIT DISTRIBUTORS OF
CALIFORNIA and RAYMOND M. CRANE,
Respondent and Appellee,

vs.

RED LION PACKING COMPANY and JOHN C.
KAZANJIAN,
Respondent and Appellant.

JUDGMENT

The above-entitled action came on regularly for trial on the 11th day of July, 1950, before the above-entitled Court, in courtroom No. 3 thereof, Hon. Peirson M. Hall, Judge, presiding, the complainant and appellee, West Texas Produce Company, appearing by Harry Bockstein, one of the partners, and both complainants and appellees appearing by J. Manuel Hoppenstein of Dallas, Texas, and Harry A. Pines of Los Angeles, California; the respondent and appellee, Raymond M. Crane, doing business as Associated Fruit Distributors of California, ap-

pearing in person and by Henry O. Wackerbarth, his attorney, and the respondent and appellant, John [179] C. Kazanjian, doing business as Red Lion Packing Company, appearing in person and by Messrs. G. L. Aynesworth and L. Nelson Hayhurst, his attorneys; and said action proceeded to trial upon (1) the complaint of the complainants originally filed before the War Food Administrator of the United States of America; (2) the answer of the respondent, John C. Kazanjian, doing business as Red Lion Packing Company, originally filed before the War Food Administrator of the United States of America; and (3) the amended answer of respondent and appellee, Raymond M. Crane, doing business as Associated Fruit Distributors of California, filed in the above-entitled Court. Thereupon, evidence both oral and documentary was introduced on behalf of the respective parties, and the evidence being closed, the cause was submitted to the Court for its consideration and decision, and after due deliberation thereon, the Court, being fully advised in the premises, and Findings of Fact and Conclusions of Law having been signed and filed herein, and the Court having ordered that judgment be entered in accordance therewith,

Now, Therefore, on motion of Henry O. Wackerbarth, attorney for Raymond M. Crane, doing business as Associated Fruit Distributors of California, and Aynesworth and Hayhurst, as attorneys for

John C. Kazanjian, doing business as Red Lion Packing Company,

It Is Therefore Ordered, Adjudged and Decreed:

1. That the complainant and appellee and John C. Kazanjian, doing business as Red Lion Packing Company did not at any time make or enter into any agreement for the sale and purchase of grapes.

2. That this action be and it is hereby dismissed as to John C. Kazanjian doing business as Red Lion Packing Company.

3. That said negotiations did not result in the making of a contract because the parties to said transaction did not at any time comply with the laws of California governing said contract. [180]

4. That said action be and the same is hereby dismissed as to Raymond M. Crane, doing business as Associated Fruit Distributors of California.

5. That assuming there was a binding agreement on the part of complainants to buy and Kazanjian to sell, 10 carloads of grapes, the complainants acquiesced in the repudiation of said contract on October 24, 1944, by contracting to purchase, or purchasing grapes to replace the grapes covered by the Kazanjian contract, and the measure of damages would arise as of October 24, 1944, at which time the price of grapes was only \$3.25 per lug or a difference of 75c in the contract price and the market price.

Done in open court this 11th day of October,
1950.

/s/ PEIRSON M. HALL,
Judge.

Approved as to form:

/s/ HENRY O. WACKERBARTH,
Attorney for Respondent
and Appellee Raymond M.
Crane, etc.

Disapproved as to form:

J. MANUEL HOPPENSTEIN,
and
HARRY A. PINES,

By /s/ HARRY A. PINES,
Attorneys for Complainants
and Appellees Central
Fruit, et al.

Judgment entered Oct. 1, 1950.

Receipt of copy acknowledged.

[Endorsed]: Filed Oct. 11, 1950. [181]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Come now Central Fruit & Vegetable Co. and West Texas Produce Co., Complainants and Appellees in the above-entitled action, and move the Court for a new trial in the above-entitled proceedings, upon the following grounds:

I.

Insufficiency of the evidence to sustain the decisions of fact made by the Court as follows:

(a) The finding of fact (part of finding No. IV) to the effect that on October 2, 1944, Kazanjian, in a long distance telephone conversation with Crane, informed Crane that he was willing to sell fifteen cars of grapes "upon the terms to be set forth in a confirmation," is contrary to the weight of [183] the evidence.

(1) The weight of the evidence establishes that in such conversation Kazanjian informed Crane that the terms worked out by Crane with the purchasers were satisfactory to him and that it was satisfactory to Kazanjian that Crane go ahead and confirm the sale.

(2) Crane testified that he informed Kazanjian in such conversation of all of the telegrams and communications between Crane and Margules, and that Kazanjian stated that such terms were acceptable to him.

(b) The finding of fact (finding No. V) that Crane by the use of the words "part payment with confirmation" and "offer subject to confirmation" intended that any sale thus negotiated be the form known as a Standard Confirmation of sale, is inconsistent with the weight of credible evidence in this case.

(1) Crane himself testified that his receipt of the Standard Memorandum of Sale from Margules left no further document necessary for completion of the transaction.

(2) Crane testified that in accordance with the customs and usage of the trade telegrams were a satisfactory substitute for confirmation forms.

(3) The finding lacks credibility for the reason that the defense was never asserted before the Secretary of Agriculture or in the trial briefs herein, but was raised for the first time at the trial. It is unreasonable to assume that if such document were intended and not furnished, the point would not have been raised prior to almost six years after negotiation of the contract.

(4) The finding is inconsistent with Crane's own testimony that the words "subject to confirmation" could mean various things depending upon the parties and circumstances.

(5) The finding is inconsistent with the conduct of the parties, as it is logical to assume that had a Standard Confirmation of Sale form been required, Crane would have rejected the [184] Standard

Memorandum of Sale sent him by Margules and would have called for the confirmation form.

(6) The finding is also inconsistent with the conduct of the parties in that the repudiation of the sale by Kazanjian was on the ground that the lifting of ceiling prices on grapes had relieved him of his obligation to perform and upon no other ground.

(7) The words "offer subject to confirmation" and the words "part payment with confirmation" are common trade terms, and are not susceptible of special meaning especially where the intention to attribute special meaning is undisclosed.

(8) The evidence in this case, and judicial notice by this Court of the decisions of the Secretary of Agriculture convincingly establish that a Standard Confirmation of Sale and the Standard Memorandum of Sale are used interchangeably with equal effectiveness for the purpose of completing sales of produce.

(c) The finding of fact (part of finding No. VII) to the effect that Crane acted as buying broker and agent for the Complainants is a proper finding, except that it is not complete. The evidence further requires the Court to find that Crane also acted as agent for Kazanjian in soliciting offers for the grapes, in advising Margules of the confirmation of the sale by Kazanjian, in advising Margules of the repudiation of the sale by Kazanjian, and in advising Margules of a counteroffer by Kazanjian

for delivery of grapes at a new and different price. The evidence discloses that it is common practice for brokers to act as agent for both parties in a transaction, and that in this case Crane acted as agent for both buyers and sellers.

(d) The finding of fact (part of finding No. IX) that the parties hereto never entered into a written agreement for the sale of ten car loads of grapes by either of respondents to either of the complainants is inconsistent with the weight of credible evidence in this case. [185]

(1) The finding is actually a conclusion of law, and the said finding is unsupported by the weight of credible evidence.

(2) Written documents in evidence constitute a written agreement for the sale by Kazanjian of ten car loads of grapes to complainants. On October 2, 1944, complainants, through Margules as broker, by teletype, directed Crane to buy ten car loads of grapes on terms which had theretofore been discussed and fixed by Crane and Margules. On October 2, 1944, Crane, by telegram to Margules, advised that confirmation had been received from Kazanjian as seller. On October 2, 1944, Crane advised Kazanjian by telephone of having effected the sale on Kazanjian's behalf. On October 3, 1944, Crane confirmed the sale to Kazanjian by telegram stating that he had sold grapes for Kazanjian's account on the terms mentioned. On October 4, 1944, Kazanjian notified Crane by telegram that such sale, on the terms mentioned, was satisfactory. The fore-

going documents fully constitute a written agreement covering the sale in question.

(3) The evidence introduced by respondents to negative such sale was self-serving, contradictory and incredible and insufficient to overcome the prima facie effect of the findings of the Secretary of Agriculture on this subject.

(e) The finding of fact (part of finding No. IX) to the effect that Kazanjian did not at any time execute or sign a written ratification of the sale is contradicted by the evidence of the telegram dated October 4, 1944, sent by Kazanjian to Crane confirming the sale of the ten car loads by Crane for the account of Kazanjian.

(f) The finding of fact (part of finding No. IX) to the effect that complainants had proposed to pay for ten car loads of grapes a price in excess of the lawful ceiling price is an improper conclusion of law and is not supported by the evidence. The [186] evidence establishes that complainants agreed to pay to the seller of the grapes no more than \$2.50 per lug which was less than the ceiling price for said grapes. It also discloses that as part of said transaction complainants agreed to pay 3½¢ per lug as a brokerage commission to the Southwest Brokerage Company in Dallas, Texas, and \$50.00 per car-load as a procurement fee to Crane as procurement broker. The burden of establishing this defense was upon the respondents, and respondents failed to establish a price paid for the grapes in excess of the ceiling price.

(g) The finding of fact (part of finding No. X) that the statements made by Crane to Margules were not false or fraudulent and not made with intent to defraud Margules or complainants, is not supported by the evidence, unless the Court finds that Kazanjian had confirmed the sale to complainants. If the Court finds that Kazanjian had not confirmed such sale, it necessarily follows that Crane falsely represented that Kazanjian had so confirmed the sale, and that such representation was made with the intention that Margules and complainants rely upon such representation.

(h) The finding of fact (part of finding No. X) that Kazanjian did not have any agent carrying on any transactions for him with persons outside of the State of California, is unsupported by the evidence, and is contradicted by the evidence that after Crane, by telephone, on October 2, 1944, and by telegram on October 3, 1944, had notified Kazanjian of the terms of the sale and that he had sold fifteen carloads of grapes for Kazanjian's account, Kazanjian, by telegram, on October 4, 1944, confirmed such sale as being satisfactory.

(i) The finding of fact (part of finding No. X) that the parties never reached a final agreement and there was no meeting of the minds, is not supported by the evidence.

(1) It is inconsistent with the written documents in evidence establishing the contract of sale. [187]

(2) It is inconsistent with the testimony of

Crane that a meeting of the minds had been reached between the buyer and the seller.

(3) It is inconsistent with the evidence that after Crane had notified Kazanjian of the terms of the sale and the fact that he had completed a sale, Kazanjian wired Crane that such deal was satisfactory.

(4) It is inconsistent with the evidence of the conduct of the parties in that the failure by Kazanjian to deliver the grapes under the contract was explained by Crane and Kazanjian both as being due solely to the lifting of ceiling prices, and not upon the ground that there had not been a meeting of the minds.

(5) It is inconsistent with the evidence of the conduct of Crane in failing to object to the Standard Memorandum of Sale sent him by Margules confirming the terms of the sale.

II.

Errors of law, as follows:

(a) It is error for the Court to make the conclusion of law (conclusion No. 1) that the telegrams sent by Crane to Margules required that any contract entered into should be confirmed in writing by the parties and particularly by Kazanjian.

(1) The foregoing conclusion of law is in fact an erroneous finding of fact unsupported by the evidence of the case.

(2) The evidence fails to support any conclu-

sion that the words "subject to confirmation" called for a special form of document or for a written confirmation as distinguished from an oral confirmation.

(3) None of the telegrams from Crane to Margules demand or request a written confirmation.

(4) The evidence does not contain anything to establish that the respondents communicated to the complainants any particular [188] intent that there be a written confirmation signed by all of the parties to the transaction.

(b) It was error for the Court to make the conclusion of law (conclusion No. 2) that Kazanjian never accepted the terms proposed by Margules and that the telegram from Kazanjian to Crane of October 4, 1944, was never accepted by Margules or the complainants.

(1) The telegram of October 4, 1944, from Kazanjian to Crane does not disclose new terms, but repeats the terms theretofore agreed upon and states that such terms are satisfactory.

(2) Crane testified that the terms of Kazanjian's wire of October 4, 1944, were the same as the terms accepted by the Southwest Brokerage Company on behalf of the complainants.

(3) The telegram of October 4, 1944, did not contain any language indicating a non-acceptance of the sale which, on October 3, 1944, Crane had informed Kazanjian by telegram had been completed.

(c) It was error for the Court to make the conclusion of law (conclusion No. 3) that no binding contract could have been entered into by Margules or Crane on behalf of complainants unless authority to Margules and Crane was in writing.

(1) The authority of Crane to act for complainants was evidenced by writings signed by Margules as broker and agent for the complainants.

(2) The agency between complainants and Margules was governed by Texas law, all of said parties being residents of the State of Texas, and the agency having been created in the State of Texas and under the law of the State of Texas, no writing was required to create such agency.

(3) The statute of frauds is not available as a defense in this case under any circumstances. The statute of frauds of the State of California is a procedural statute and not a matter of substantive law. The present action was brought to [189] enforce a liability under the Perishable Agricultural Commodities Act, a federal statute. In enforcing a federal statute, a federal court is not affected by procedural statutes of the State wherein the action is being tried or the State whose laws govern the contract.

(4) Even if the statute of frauds of the State of California were applicable herein, it serves merely to require that there be a written memorandum signed by the "party to be charged" in the proceeding. The parties to be charged in this proceeding are Crane and/or Kazanjian. The written

memoranda in evidence in this case, signed by both Crane and Kazanjian, are sufficient to satisfy the statute of frauds of the State of California.

(d) It was error for the Court to make the conclusion of law (conclusion No. 4) that there had been an acquiescence by complainants of the repudiation of the contract by Kazanjian on October 24, 1944, and that the measure of damage would arise as of October 24, 1944. The law of the State of California and the Uniform Sales Act are well settled that the date when delivery was to have been made rather than the date of repudiation governs the determination of the measure of damages.

(e) It was error for the Court not to recognize as the law of the case that a broker may be the agent of both parties and that in this case the evidence disclosed that Crane acted as procurement broker for complainants and also acted as agent for Kazanjian in informing Margules that Red Lion had confirmed the sale and in other particulars.

(f) It was error for the Court to make the conclusion of law (conclusion No. 5) that Crane did not misrepresent any facts to Margules with reference to the contract in question and that the statements and representations made by Crane were not fraudulent and that no liability arose on the part of Crane for statements and representations made by him to Margules or the complainants. [190]

(1) If the Court's finding is permitted to stand to the effect that Kazanjian did not confirm the

sale, it necessarily follows that the telegram from Crane to Margules on October 2, 1944, that he had secured Kazanjian's confirmation of the sale, was false.

(2) The fraudulent purpose required by Section 2b(4) of the Perishable Agricultural Commodities Act of 1930, as amended, does not require actual fraud but may consist of a false statement or representation of a material fact with intention that the other party rely thereon. All of these elements are satisfied by uncontradicted testimony in this case.

(3) The conduct of Crane in informing complainants of the confirmation of the sale and the failure by Crane to object to the Standard Memorandum of Sale as the proper form (assuming that the Court finds that the Standard Confirmation of Sale was the form contemplated herein) constitutes a violation of Section 2b(4) of the Perishable Agricultural Commodities Act as a failure "without reasonable cause to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction;". The foregoing provision from said section also does not require any evidence of a fraudulent purpose.

III.

Error in law in admitting evidence over the objections of the complainants, as follows:

(a) Receipt in evidence of defendant's Exhibit A, consisting of the report of the Examiner of the

Secretary of Agriculture, which had been superseded by the findings of fact and conclusions of law officially rendered by the Judicial Officer of the Department of Agriculture. Said evidence is incompetent, irrelevant, immaterial, and hearsay.

(b) Receipt of testimony of Crane that when he sent the telegram of September 26, 1944, to Southwest Brokerage Company and [191] the amended telegram of October 2, 1944, that by the use of the words "subject to confirmation" in such telegrams, he was referring to a confirmation by use of a Standard Confirmation of Sale, as known to the trade. Such testimony was an attempt to vary the terms of a written instrument prepared by the said witness, and was a statement of a self-serving conclusion.

(c) Receipt of testimony over the objection of complainants relating to a failure of complainants to sign a written instrument. Such testimony was incompetent, irrelevant, immaterial and based upon a misconception of the statute of frauds which requires only that a written memorandum be signed by the party to be charged in the proceeding.

(d) Receipt of testimony over the objection of the complainants as to the value of Emperor grapes during the months of October and November of 1944. Said evidence was objectionable on the grounds that it was incompetent, irrelevant and immaterial, said evidence having been received under a misconception of the law of damages to the effect that the date of repudiation rather than

the date of delivery contracted for governs in determining such damages.

IV.

Newly discovered evidence upon the subject of the existence of any custom or usage in the trade requiring the use of a Standard Confirmation of Sale form rather than the Standard Memorandum of Sale form. This Court permitted evidence to the effect that customs of the trade in this transaction required the use of the Standard Confirmation of Sale rather than the Standard Memorandum of Sale. Attached hereto and made a part hereof are the affidavits of Harry Bockstein, J. Manuel Hoppenstein and Harry A. Pines disclosing that such contention on the part of the respondents was unknown to complainants and their counsel until raised for the first time during the trial of the case before this [192] Court; that the pendency of the trial did not permit complainants, who were residents of the State of Texas, to obtain evidence on the subject with which to inform the Court of the actual practices, other than the testimony of Harry Bockstein, one of the partners of one of the complainants, to the effect that in his forty-five years of active experience in the business he had never signed the form known as Standard Confirmation of Sale, but that in his experience only the Standard Memorandum of Sale was used. The affidavits will disclose also that upon diligent inquiry immediately following the trial, complainants ascertained that unlimited testimony was available

to the effect that the Standard Confirmation of Sale form is seldom if ever used, and that the experience of most of the people engaged in the interstate produce business is that the Standard Memorandum of Sale is always used when a transaction is negotiated by a broker. That attached hereto also are the affidavits of R. C. Mills of Dallas, Texas; Bill Taylor, of Dallas, Texas; Joe Mosesman of Dallas, Texas; George Reaves of Dallas, Texas; Sam Lipshitz of Fort Worth, Texas; S. W. Wilson of Fort Worth, Texas; Jim Hill of Fort Worth, Texas; Harry Bockstein of Fort Worth, Texas, and Abe M. Katz of Corpus Christi, Texas, all of whom have stated that if called upon to testify in this case they will testify that they are familiar with the customs, usage and practice in the produce trade in connection with the sale and confirmation of sale of perishable agricultural commodities and it was not the custom and usage in the trade to consummate sales by the use of the form known as Confirmation of Sales agreement, but on the contrary the usage and custom in the trade was and is to confirm sales on the form known as "Standard Memorandum of Sale" and signed by the broker. The affidavit of Harry A. Pines, attached hereto, will further disclose that an examination of the decisions of the Secretary of Agriculture discloses no custom or practice requiring the use of the [193] Standard Confirmation of Sale agreement, but on the contrary that the rules and regulations of the Secretary of Agriculture permit and direct the use of either form, and that where brokers are involved

the overwhelming number of cases which have reached the Secretary of Agriculture for decision disclose the use of the Standard Memorandum of Sale rather than the Standard Confirmation of Sale form.

V.

Newly discovered law, consisting of the decision of the Circuit Court of Appeals for the Third Circuit, in the case of *Rothenberg v. H. Rothstein & Sons*, 183 Fed. (2d) 524, decided on July 21, 1950 (subsequent to the trial of the instant case), and not reported until September 25, 1950. This case holds that where the language of the statute of frauds is similar to that of Section 1624a of the California Civil Code, such a statute is a procedural statute only and will not constitute a defense to an action brought under the Perishable Agricultural Commodities Act.

By special memorandum attached hereto, the determinative effect of such case on the issue of the statute of frauds herein is discussed.

Dated this 20th day of October, 1950.

J. MANUEL HOPPENSTEIN
and

HARRY A. PINES,

By /s/ HARRY A. PINES,

Attorneys for Complainants
and Appellees.

[Endorsed]: Filed Oct. 20, 1950. [194]

[Title of District Court and Cause.]

NOTICE OF MOTION TO SET MOTION FOR
NEW TRIAL AND TO GRANT ORAL AR-
GUMENTS THEREON.

To Associated Fruit Distributors of California and
Raymond M. Crane, Respondent and Appellee,
and to Henry O. Wackerbarth, Their Attorney,
and to Red Lion Packing Company and John C.
Kazanjian, Respondent and Appellant, and to
Aynesworth & Hayhurst, Their Attorneys:

You and each of you will please take notice that
on the 6th day of November, 1950, at 10:00 o'clock
a.m., or as soon thereafter as counsel may be heard,
a motion will be made before the Honorable Peirson
M. Hall, Judge of the United States District [216]
Court, in the court room of the said judge, in the
Federal Building, Temple and Spring Streets, Los
Angeles, California, for an order setting a date of
hearing upon the Motion for New Trial filed herein
by Central Fruit & Vegetable Co. and West Texas
Produce Company, Complainants and Appellees
herein, and for an order permitting the presentation
of oral argument upon said Motion for New Trial.

This motion will be made upon the files and rec-
ords of this proceedings, including the Motion for
New Trial and affidavits and points and authorities
filed therewith, and upon the affidavit of Harry A.

Pines and the points and authorities attached hereto.

Dated: October 26th, 1950.

J. MANUEL HOPPENSTEIN

and

HARRY A. PINES,

By /s/ HARRY A. PINES,

Attorneys for Central Fruit & Vegetable Co. and
West Texas Produce Company, Complainants
and Appellees. [217]

[Title of District Court and Cause.]

AFFIDAVIT OF HARRY A. PINES IN SUP-
PORT OF MOTION TO PERMIT ORAL
ARGUMENT

State of California,
County of Los Angeles—ss.

Harry A. Pines, being first duly sworn upon his
oath, deposes and says:

That he is one of the attorneys of record for Cen-
tral Fruit & Vegetable Co. and West Texas Produce
Company, Complainants and Appellees herein, who
have filed a Motion for New Trial in this proceed-
ing.

That your affiant veritably believes that [218]
careful consideration by this court of said Motion
for New Trial will result in the granting of a new
trial herein; and that proper presentation of said
Motion for New Trial requires the making of oral
arguments thereon.

That many of the new grounds upon which the

Motion for New Trial is based involves the sufficiency of the evidence to sustain the findings of fact made by the court. That it will be necessary for counsel to refer to the testimony presented to the court, and to make reference to the reporter's transcript of the proceedings. That although the Motion for New Trial sets forth in detail the basis upon which the findings of the court are not supported by the evidence, it is necessary to make reference to specific testimony which requires an opportunity for oral argument.

It is very important that the court carefully consider the Motion for New Trial, as the decision of the court as it now stands will cause untold confusion to the interstate perishable agricultural commodities industry. That the decision of the court has placed an unwarranted emphasis upon the form known as "Standard Confirmation of Sale," and will create confusion amongst the dealers and brokers unaccustomed to the use of such form in view of the court's ruling that "subject to confirmation" necessarily contemplates the execution of a "Standard Confirmation of Sale."

Oral argument is also advisable in view of the decision of the Circuit Court of Appeals for the Third Circuit. In the case of *Rothenberg v. H. Rothstein & Sons*, 183 Fed. (2d) 524, decided after the trial of this case, it was determined that in an action such as the instant one the statute of frauds based upon a statute similar to the California statute is not a defense. Because of the importance of the question and the need to consider a decision not

available to the court or counsel at the time of trial, oral argument thereon is highly desirable.

/s/ HARRY A. PINES,

Subscribed and Sworn to Before Me this 26th day of October, 1950.

[Seal] /s/ BLANCHE MORRIS,

Notary Public in and for Said
County and State. [219]

[Title of District Court and Cause.]

POINTS AND AUTHORITIES IN SUPPORT
OF MOTION FOR SETTING AND FOR
ORAL ARGUMENT

Rule 17 (b) (4) of the Local Rules of this court provides that when the Motion for New Trial is ready for hearing, the same shall, without any request from either party, be placed by the clerk upon the next motion calendar, unless the judge assigns some other day for the hearing thereof.

Rule 3 (c) of the Local Rules provides that motions in general shall be submitted and determined upon the motion papers referred to in the rule. It further provides that oral arguments shall be per-

mitted only upon application and proper showing to [220] the judge presiding at the hearing.

Dated: October 26th, 1950.

Respectfully submitted,

J. MANUEL HOPPENSTEIN

and

HARRY A. PINES,

By /s/ HARRY A. PINES,

Attorneys for Central Fruit & Vegetable Co. and
West Texas Produce Company, Complainants
and Appellees.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Oct. 26, 1950. [221]

At a stated term, to wit: The September Term, A.D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday, the 6th day of November, in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable Peirson M. Hall,
District Judge.

[Title of Cause.]

MINUTES OF NOV. 6, 1950

For hearing on motion of plaintiff for new trial,

pursuant to notice of Oct. 26, 1950; Harry A. Pines, Esq., appearing as counsel for Central Fruit & Vegetable Co.; Henry O. Wackerbarth, Esq., appearing as counsel for Associated Fruit Distributors; Nelson Hayhurst, Esq., appearing as counsel for Red Lion Packing; Court orders that defendants have ten days to answer and plaintiff give days thereafter to reply; the cause then to stand submitted. [222a]

At a stated term, to wit: The September Term, A.D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday, the 16th day of January, in the year of our Lord one thousand nine hundred and fifty-one.

Present: The Honorable Peirson M. Hall,
District Judge.

[Title of Cause.]

MINUTES OF JANUARY 16, 1951

This cause being submitted on motion of Central Fruit & Vegetable Co. and West Texas Produce Co. for a new trial, the Court having considered same, including the briefs and arguments of counsel, denies said motion. [222b]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Central Fruit & Vegetable Co. and West Texas Produce Company, Complainants and Appellees in the above-entitled action, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the judgment entered on October 11, 1950, an order having been entered on January 16th, 1951, denying the motion of said Complainants and Appellees for a new trial.

This 13th day of February, 1951.

J. MANUEL HOPPENSTEIN

and

HARRY A. PINES,

By /s/ HARRY A. PINES,

Attorneys for Complainants
and Appellees herein.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Feb. 14, 1951. [223]

[Title of District Court and Cause.]

UNDERTAKING FOR COST BOND
ON APPEAL

Bond No. 2583444e

Know All Men by These Presents:

Whereas, Central Fruit and Vegetable Co. and West Texas Produce Company, Complainants, in the above-entitled action, are about to appeal to the United States Circuit Court of Appeals for the Ninth Circuit, in the State of California, from a judgment entered October 11, 1950, against Central Fruit and Vegetable Co. and West Texas Produce Company, Complainants in said action, in the said District Court of the United States in favor of Associated Fruit Distributors of California, Raymond M. Crane, Red Lion Packing Company and John C. Kazanjian, Respondents.

Now Therefore, in consideration of the premises and of such appeal, the undersigned Hartford Accident and Indemnity Company, a corporation organized and existing under the laws of the State of Connecticut and authorized to transact a surety business in the State of California, as Surety, does hereby undertake and promise on the part of the Appellees that said Appellees shall answer all costs which may be adjudged against them or either of them if the appeal is dismissed or the order is affirmed or such costs as the Appellate Court may award if the order is modified, not exceeding Two Hundred Fifty

(\$250.00) Dollars to which amount it acknowledges itself bound.

This recognizance shall be deemed and construed to contain the "consent and Agreement" for summary judgment and execution thereon mentioned in Rule No. 8 of the District Court.

In Witness Whereof, the said surety has caused these presents to be executed and its official seal attached by its duly authorized Attorney-in-Fact at Los Angeles, California, the 15th day of February, 1951.

HARTFORD ACCIDENT AND
INDEMNITY CO.

[Seal] By /s/ D. J. WAITE,
Attorney-in-Fact.

Examined and recommended for approval as provided in Rule No. 8.

/s/ HARRY A. PINES,
Attorney.

The Premium Charge on This Bond is [225]
\$10.00.

State of California,
County of Los Angeles—ss.

On this 15th day of February, in the year 1951, before me, Eleanor G. Davis, a Notary Public in and for said County, residing therein, duly commissioned and sworn, personally appeared D. J. Waite, known to me to be the Attorney-in-Fact of the Hartford Accident and Indemnity Company, the Corporation

described in and that executed the within instrument, and also known to me to be the person who executed it on behalf of the Corporation therein named, and he acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] /s/ ELEANOR G. DAVIS,
Notary Public in and for the
County of Los Angeles,
State of California.

My Commission Expires May 27, 1951.

[Endorsed]: Filed Feb. 16, 1951. [225]

[Title of District Court and Cause.]

STATEMENT OF POINTS INTENDED TO BE RELIED UPON ON APPEAL

Complainants and appellees, Central Fruit and Vegetable Co. and West Texas Produce Company, now appealing from the judgment filed herein on October 11, 1950, do hereby set forth the following points upon which they intend to rely on appeal, to wit:

1. That the evidence is insufficient to support the sixth unnumbered subparagraph of Paragraph IV of the Findings of Fact wherein the District Court found that in a long distance telephone conversation

on October 2, 1944, between Crane and Kazanjian, Kazanjian informed Crane that he was willing to sell fifteen cars of grapes "upon the terms to be set forth in a confirmation."

2. That the evidence is insufficient to support Finding No. V of the Findings of Fact wherein the District Court found [226] that Crane by use of the following words in his telegram of September 26, 1944, to wit: "500.00 part payment with confirmation" and by use of the code word "ADLAM," intended that any sale negotiated as a result of the sending of said telegram should be negotiated by a special form known as a Standard Confirmation of Sale.

3. That the evidence is insufficient to support the first unnumbered subparagraph of Paragraph IX of the Findings of Fact wherein the District Court found that the parties to this proceeding never at any time entered into a written agreement for the sale of ten carloads of grapes by either of the respondents to either of the complainants.

4. That the evidence is insufficient to support that portion of the third unnumbered subparagraph of Paragraph IX of the Findings of Fact wherein the District Court found that Kazanjian at no time executed or signed a written ratification of the sale.

5. That the evidence is insufficient to support the fourth unnumbered subparagraph of Paragraph IX wherein the District Court found that complainants had proposed, agreed or contracted to pay, in connection with said proposed sale or sales, a sum of

money in excess of the selling price as established under the Federal Emergency Price Control Act.

6. That the evidence is insufficient to support the first unnumbered subparagraph of Paragraph X of the Findings of Fact wherein the District Court found that the statements and representations made by Crane to Margules and the Southwest Brokerage Company were not false or fraudulent, and were not made with any intention to defraud said Southwest Brokerage Company or the said Margules or the complainants herein.

7. That the evidence is insufficient to support that portion of the second unnumbered subparagraph of Paragraph X of the Findings of Fact wherein the District Court found that Kazanjian did not have any agent carrying on any transactions in his behalf with any person [227] outside of the State of California.

8. That the evidence is insufficient to support the third unnumbered subparagraph of Paragraph X of the Findings of Fact wherein the District Court found that the parties hereto had never at any time finally agreed upon any terms of a contract for the sale of ten carloads of grapes or any other number of carloads of grapes, and that there was no meeting of minds of the parties as to the terms of the proposed sale.

9. That neither the Findings of Fact nor the evidence are sufficient to support or justify the Conclusion of Law set forth under Paragraph 1 of the Con-

clusions of Law wherein the District Court concluded that the telegrams sent by Crane to Margules required that any contract entered into should be confirmed in writing by the parties to the proposed contract and in particular Kazanjian at Exeter.

10. That neither the Findings of Fact nor the evidence are sufficient to support or justify the Conclusion of Law set forth under paragraph 2 of the Conclusions of Law wherein the District Court concluded that Kazanjian never accepted the terms proposed by Margules and that Kazanjian's telegram of October 4th, 1944, to Crane was never accepted by Margules or the complainants.

11. The District Court erred in its Conclusion of Law No. 3 in concluding that no binding contract could have been entered into by Margules or Crane on behalf of the complainants unless the authority to Margules and Crane was in writing.

12. That neither the Findings of Fact nor the evidence are sufficient to support or justify Conclusion No. 4 wherein the District Court concluded that the complainant acquiesced in the repudiation of the contract on October 24, 1944, by undertaking to replace the grapes covered by the Kazanjian contract, and that the measure of damages would arise as of October 24, 1944.

13. That neither the Findings of Fact nor the evidence are [228] sufficient to support or justify Conclusion of Law No. 5 of the Conclusions of Law wherein the District Court concluded that Crane

did not misrepresent to Margules or the complainant any facts with reference to the contract in question or the proposed contract, and that the statements or representations by Crane were not fraudulent, and that no liability arose on the part of Crane for the statements or representations made by him to Margules or the complainant.

14. That the District Court erred in Conclusion No. 6 of the Conclusions of Law in concluding that the action should be dismissed as to Kazanjian.

15. That the District Court erred in Conclusion No. 6 of the Conclusion of Law in concluding that the action should be dismissed as to Crane.

16. That the District Court erred in failing to give effect to the Findings of Fact of the Secretary of Agriculture as constituting prima facie evidence of the facts at issue in this case.

17. The District Court erred in receiving in evidence over the Complainants' objections, Respondents' Exhibit A consisting of an interlocutory report by an examiner of the Secretary of Agriculture, which report was superseded by the official decision of the Secretary of Agriculture.

18. That the District Court erred in receiving the testimony of Crane over the objection of complainants to the effect that when he sent the telegram of September 26, 1944, to Southwest Brokerage Company, he was referring to a special form known as Standard Confirmation of Sale.

19. The District Court erred in receiving in evidence, over the objection of complainants, the testi-

mony of Crane and Kazanjian relating to a failure of complainants to sign a written instrument evidencing the authority of Margules to act in behalf of the complainants.

20. The District Court erred in receiving testimony of [229] Crane and Kazanjian over the objection of complainants as to the value of Emperor grapes during the months of October and November of 1944.

21. The District Court erred in failing to conclude that a contract binding upon Kazanjian for the sale of the ten cars of grapes resulted from the following written documents to wit: (1) The telegram from Crane to Southwest Brokerage Company on October 2, 1944, reading "secured Red Lion Packing Company confirmation, 10 cars grapes as outlined * * *," (2) The standard memorandum of sale prepared and signed by Southwest Brokerage Company and forwarded on October 3, 1944, to Crane, and the failure of Crane to make objection to same, (3) The telegram sent by Crane to Kazanjian under date of October 3, 1944, advising that Crane had "sold for your account basis 2.50 lug net to you, block Emperors mentioned * * *," and (4) The telegram on October 4, 1944, from Kazanjian to Crane stating that "15 cars storage U.S. One Emperors December 10th conversion satisfactory * * *."

22. The District Court erred in failing to conclude that if Crane had not been authorized by Kazanjian to confirm the sale of the 10 cars of grapes, it follows that under Section 2(b)(4) of the Perishable Agricultural Commodities Act, Crane is

liable for the loss sustained by complainants by virtue of his false representation to complainants that such confirmation had been procured.

23. The District Court erred in failing to conclude that if Crane intended that the form known as "Standard Confirmation of Sale" be required for use in confirming said transaction, and if Crane further intended that such "Standard Confirmation of Sale" form be signed by the buyers themselves as distinguished from their Dallas, Texas, broker, and that such form also be signed by the seller himself, it follows that under Section 2(b)(4) of the Perishable Agricultural Commodities Act, Crane is liable to the complainants for failing without reasonable cause to so inform the [230] complainants of such intention.

24. The District Court erred in failing to find from the evidence that Crane, in addition to acting as a procurement broker for complainants, also acted as agent for Kazanjian in various phases of the sale transaction, and in the transmission of offers and counter-offers.

25. The District Court erred in failing to adhere to the rule of law that a broker can and frequently does act as agent for more than one party to a transaction.

26. The District Court erred in failing to adhere to the rule of law which establishes that the measure of damages for breach of contract to deliver goods is determined by the date of delivery under the contract and not the date of the repudiation of the contract.

27. The District Court erred in failing to find from the evidence that the authority orally vested in Crane by Kazanjian on October 2, 1944, to confirm the sale to complainants was subsequently ratified in writing by Kazanjian on October 4, 1944, in a telegram from Kazanjian to Crane.

28. The District Court erred in rendering extrajudicial findings unnecessary to the decision of the Court and expressly made for the purpose of discouraging complainants from appealing from the District Court decision.

29. The District Court erred in holding that a secret and unexpressed intention on the part of Crane as broker that a special form known as "Standard Confirmation of Sale" was required for the purpose of consummating the sale, was binding upon the complainants despite the absence of any evidence that complainants or their agent Southwest Brokerage Company had ever been informed of such unexpressed intention.

30. The District Court erred in finding from Crane's testimony alone that Crane harbored the intention that a "Standard [231] Confirmation of Sale" was necessary to consummate the sale, despite the contradiction by testimony of Crane himself in the proceedings before the Secretary of Agriculture and in depositions introduced into evidence wherein Crane testified that he considered the Standard Memorandum of Sale sent to him by Southwest Brokerage Company as a sufficient confirmation of the sale.

31. The District Court erred in failing to make findings of fact as to whether the telegrams from Crane to Southwest Brokerage Company under date of October 10, 1944, October 12, 1944, and October 16, 1944, had been authorized by Kazanjian.

32. The District Court erred in failing to give consideration to objections which were filed by complainants to the Findings of Fact and Conclusions of Law as proposed by the respondents.

33. The District Court erred in that the findings of fact herein are not supported by the evidence.

34. The District Court erred in that its decision is contrary to law.

35. The District Court erred in denying complainants' motion for new trial.

36. The District Court erred in making an order denying complainants' application for permission to orally argue their motion for new trial herein.

This 27th day of February, 1951.

J. MANUEL HOPPENSTEIN

and

HARRY A. PINES,

By /s/ HARRY A. PINES,

Attorneys for Central Fruit and Vegetable Co. and
West Texas Produce Company, Complainants
and Appellees Herein.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Feb. 27, 1951. [232]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

To the Clerk of the District Court of the United States for the Southern District of California, Central Division:

You are hereby requested to prepare, certify and transmit to the clerk of the United States Court of Appeals for the Ninth Circuit, with reference to the Notice of Appeal heretofore filed by complainants in the above cause, transcript of the record in the above cause, prepared and transmitted as required by law and by rules of said court, and to include in said record the following documents, or certified copies thereof, to wit:

1. Notice of Appeal from Reparation Order of Secretary of Agriculture filed in the District Court May 21, 1948.

2. Petition setting forth proceedings before the Secretary of Agriculture and grounds upon which petitioner relies to defeat [234] right of complainants to recover damages, filed May 21, 1948.

3. Certified copy of proceedings before the Secretary of Agriculture, filed in the District Court July 30, 1948.

4. Amended answer of Raymond M. Crane filed October 25, 1950.

5. Trial brief of Raymond M. Crane filed November 25, 1949.

6. Trial brief of complainants filed July 6, 1950.
7. Trial brief of John C. Kazanjian filed July 8, 1950.
8. The evidence and proceeding at the trial which were stenographically reported by Agnar Wahlberg, covering proceedings held July 11, 12, and 13, 1950.
9. All exhibits filed in this case.
10. Objections of complainants to proposed Findings of Fact and Conclusions of Law, filed October 11, 1950.
11. Findings of Fact, Conclusions of Law and Judgment, filed October 11, 1950.
12. Motion for new trial of complainants filed October 20, 1950.
13. Notice of motion to set date of hearing upon motion for new trial and to grant oral arguments thereon.
14. The proceedings held November 6, 1950, on hearing of complainants' motion to set a date of hearing for the motion for new trial and to grant oral arguments thereon, which proceedings were stenographically reported by Agnar Wahlberg.
15. Minute order of November 6, 1950, relating to complainants' motion to set hearing for motion for new trial and to grant oral arguments thereon.
16. Minute order denying motion for new trial, filed January 16, 1951.

17. Notice of Appeal by Central Fruit and Vegetable Co. and West Texas Produce Company filed February 13, 1951.

18. Undertaking on appeal filed on February 15, 1951, by Central Fruit and Vegetable Co. and West Texas Produce Company. [235]

19. Statement of Points Intended to be Relied upon on Appeal, filed herewith.

20. This Designation of Record.

Pursuant to the provisions of Rule 75 (o) of the Rules of Civil Procedure and pursuant to Rule 11 of the Rules of the United States Court of Appeals for the Ninth Circuit, as amended, request is hereby made that the Clerk of the above-entitled court transfer all the original papers in the file dealing with the action or the proceedings in which the appeal has been taken.

Dated: This 27th day of February, 1951.

H. MANUEL HOPPENSTEIN
and
HARRY A. PINES,

By /s/ HARRY A. PINES,
Attorneys for Central Fruit and Vegetable Co. and
West Texas Produce Company, Complainants
and Appellees in the District Court, and Ap-
pellants in the United States Court of Appeals
for the Ninth Circuit.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Feb. 27, 1951. [236]

In the United States District Court, Southern
District of California, Central Division

No. 8244-PH Civil

CENTRAL FRUIT & VEGETABLE CO. and
WEST TEXAS PRODUCE COMPANY,
Complainants and Appellees,

vs.

ASSOCIATED FRUIT DISTRIBUTORS OF
CALIFORNIA and RAYMOND M. CRANE,
Respondents and Appellees,

vs.

RED LION PACKING COMPANY and JOHN
C. KAZANJIAN,
Respondents and Appellants.

Honorable Peirson M. Hall, Judge, Presiding.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

July 11, 1950.

Appearances:

For Complainants and Appellees:

HARRY A. PINES, ESQ.,

975 Subway Terminal Building,
Los Angeles 13, California; and

J. MANUEL HOPPENSTEIN, ESQ.

Southwestern Life Building,
Dallas 1, Texas.

For Respondent and Appellee John C. Kazanjian, dba Red Lyon Packing Company:

AYNESWORTH & HAYHURST,

1012-1020 Helm Building,

Fresno, California; by

L. NELSON HAYHURST, ESQ.

For Respondent and Appellant Raymond M. Crane, dba Associated Fruit Distributors of California:

HENRY O. WACKERBARTH, ESQ.,

601 F. P. Fay Building,

Los Angeles 13, California.

* * *

Mr. Hoppenstein: Under the statute the decision of the Secretary of Agriculture and certification of his record, which is before your Honor, creates a prima facie case in favor of Central Fruit & Vegetable Company and the West Texas Produce Company.

The Court: I read the statute and it says that they should be prima facie taken as true.

Mr. Hoppenstein: That is right, with the burden then shifting to the persons appealing.

The Court: If that is agreeable. [12]

* * *

Mr. Hoppenstein: Your Honor, at this time I offer a certification of the proceedings from the United States Department of Agriculture, which

includes the complaint in PACA Docket No. 4589, entitled Central Fruit & Vegetable Company and West Texas Produce Company, complainants, v. Raymond M. Crane, doing business as Associated Fruit Distributors of California and John C. Kazanjian, doing business as Red Lion Packing Company, respondents, with Exhibits Nos. 1 to 6, inclusive, attached, being the answer of the respondent John C. Kazanjian, doing business as Red Lion Packing Company; answer of respondent Raymond M. Crane, doing business as Associated Fruit Distributors of California, and preliminary statement, findings of fact, conclusions, and order, dated April 23, 1948, by Thomas J. Flavin, Judicial Officer, certified by Charles W. Bucy, Associate Solicitor, under the direction of the Secretary of Agriculture and sent under the seal of the Department of Agriculture.

You have seen these?

Mr. Wackerbarth: Yes.

The Court: Is there any objection?

Mr. Hayhurst: No objection. [15]

The Court: Complainants' Exhibit No. 1 in evidence.

(The documents referred to were received in evidence and marked Complainants' Exhibit No. 1.)

Mr. Hoppenstein: Now, if your Honor please, the next offer in evidence as an exhibit is the deposition of John C. Kazanjian, taken by Central Fruit & Vegetable Company and West Texas Produce Company, as an adverse party under the rule of

the taking of testimony of an adverse party, taken on April 28, 1950, at 2:00 o'clock p.m.

The Court: That was taken in this case after it was filed?

Mr. Hoppenstein: After it was filed; yes, your Honor.

The Court: I see.

Mr. Hoppenstein: Now if your Honor intends—and I am sure the court will—to read the deposition we will not burden the court at this time with reading the questions and answers unless the court at this time would like to hear it.

The Court: It is immaterial to me. One way or the other. You are offering it?

Mr. Hoppenstein: We are offering it in its entirety.

The Court: If you offer it, I shall read it unless there is some insistence that it shall be read.

Mr. Hayhurst: We thought that it would be for the court's convenience better to offer them as exhibits and then the court can spend what time it may have available when it [16] has time available.

The Court: Very well. That is Complainants' Exhibit No. 2, the deposition of John C. Kazanjian.

(The document referred to was marked Complainants' Exhibit No. 2 and received in evidence.)

Mr. Hoppenstein: As Exhibit No. 3 we offer in evidence as an exhibit a deposition of the adverse party Raymond M. Crane, taken at Los Angeles,

California, on Friday, April 28, 1950, at 2:00 o'clock p.m., which deposition is not signed but which counsel for Mr. Crane stipulates may be introduced as his testimony.

* * *

The Court: Is there any objection? (No response.)

It is in evidence as Exhibit No. 3.

(The deposition of Raymond M. Crane was marked Complainants' Exhibit No. 3 and received in evidence.)

Mr. Hoppenstein: Your Honor please, I would like to be sworn to testify with reference to attorney fees. [17]

* * *

J. MANUEL HOPPENSTEIN

called as a witness by and on behalf of the complainants, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name, please?

The Witness: J. Manuel Hoppenstein; H-o-p-p-e-n-s-t-e-i-n.

The Clerk: And your address?

The Witness: 1010 Southwestern Life Building, Dallas, Texas. [18]

* * *

Cross-Examination

By Mr. Hayhurst:

* * *

Q. I have a photostatic copy of the examiner's

(Testimony of J. Manuel Hoppenstein.)

report that is marked received May 19, 1947, in the office of the [27] solicitor. Would that be approximately the correct date? May I show you this to refresh your memory? A. Yes, please.

(The document referred to was passed to the witness.)

* * *

Mr. Hayhurst: We might offer this in evidence just to clarify some of these dates.

The Court: Do you limit it for that purpose, or do you offer it in evidence generally?

Mr. Hayhurst: We will offer it in evidence generally for any purpose that anyone may desire to use it for.

Mr. Pines: We would object to it on the ground that it is incompetent, irrelevant, immaterial, and hearsay; and furthermore that it is not part of the proceedings in this court or before the court below, and has no proper place in this case except for the limited purpose that counsel wishes to offer it for. [28]

* * *

The Court: The objection to the admissibility is overruled. It will be admitted in evidence for all purposes.

* * *

(The document referred to was marked Respondents' Exhibit A and received in [30] evidence.)

* * *

Mr. Hoppenstein: We offer in evidence as an exhibit the deposition of Joe Mosesman.

* * *

The Court: Is there any objection? (No response.)

The Court: That will be Exhibit No. 4 in evidence.

(The deposition of Joe Mosesman was marked Complainants' Exhibit No. 4 and received in evidence.)

Mr. Hoppenstein: We offer in evidence as an exhibit a certified copy from the Secretary of the Department of Agriculture of the testimony heard at the hearing on February 19, 1947, which includes all the exhibits received as evidence with the exception of Exhibit No. 2, report of [36] investigation, and Exhibit No. 3, the complaint, which as I understand it, are already part of the transcript of the record filed by the Secretary of Agriculture. [37]

* * *

The Court: Very well. In evidence.

(The documents referred to were marked Complainants' Exhibit No. 5 and received in evidence.)

Mr. Hoppenstein: Central Fruit & Vegetable Company and West Texas Produce Company rest, your Honor. [38]

* * *

HARRY BOCKSTEIN

called as a witness by and on behalf of the respondents under Rule 43(b), having been first duly sworn, was examined and testified as follows:

The Clerk: Your name, please?

The Witness: Harry Bockstein.

The Clerk: Your address? [41]

* * *

The Witness: Fort Worth.

* * *

Direct Examination

By Mr. Wackerbarth:

Q. Mr. Bockstein, you are a member of the partnership of the West Texas Company?

A. West Texas Produce Company; yes, sir.

Q. How long have you been connected with that company? A. Ever since it started.

Q. When was that?

A. Well, the West Texas Produce Company was started in 1926, but before that I was in partners with the same party before, since 1940. [42]

* * *

Q. How long have you been in the produce business? A. Since 1905.

* * *

Q. And after you were informed that Kazanjian, or Red Lion, would not deliver this fruit, I understand that you made some efforts to buy fruit?

A. Yes.

* * *

(Testimony of Harry Bockstein.)

Q. And you bought a carload of fruit from Nash-De Camp Company? A. Yes.

* * *

The Court: Did you buy a carload of fruit? [43]

The Witness: I bought some from a lot of people.

The Court: Grapes?

The Witness: Grapes, yes, sir. I bought a lot of grapes.

Q. (By Mr. Wackerbarth): I am saying, after they informed you that they were not going to deliver this fruit, did you go out and buy some grapes?

A. Yes. I bought some, not for that purpose; I bought some to use right now. I didn't buy them for storage.

Q. You did buy some grapes?

A. Yes, I bought a lot of them.

Q. Did you buy a carload of grapes from the Nash-De Camp Company on October 31, 1944?

A. I don't remember exactly, but I bought from plenty of other people too. [44]

* * *

Q. Now, I show you, Mr. Bockstein, from the deposition here a copy of an invoice of Nash-De Camp Company. Does that represent the carload of Emperor grapes that you purchased on October 31, 1944?

A. Yes, I bought that. That is an invoice.

Q. And those were purchased by you after you

(Testimony of Harry Bockstein.)

were informed that the Red Lion would not ship this fruit, isn't that correct?

A. Well, Red Lion was not supposed to ship those fruit and I wasn't supposed to get that fruit until December 11th.

The Court: No, his question is whether or not you bought those after you were informed they would not ship.

The Witness: I don't remember exactly because I don't [45] remember exactly the date, but I was informed that I wasn't going to get it, but I continued buying grapes right all the way through the season, buying one at a time, not for storage but to to use right now.

Here is a bill over here that I bought from C. H. Robinson Company on January 22nd and what I paid.

Q. When were you informed that the Red Lion would not ship this fruit, these grapes?

A. I don't remember exactly.

* * *

Q. After you were informed that Red Lion would not ship these grapes, what did you do about buying other grapes?

A. I tried to buy some from other people.

Q. I asked you, what did you do?

A. I kept on buying grapes.

Q. Did you buy a carload of grapes from Nash-De Camp Company?

A. I don't know.

Q. You see an invoice there, don't you? [46]

A. Yes, I guess I did. Here is the invoice.

(Testimony of Harry Bockstein.)

Q. Do you know how much you paid a box for those grapes?

A. Here is the bill right here; \$3.50.

Q. And that is the amount which you paid for them at that time?

A. It is the amount I paid for that car.

Q. What other companies did you try to buy grapes from?

A. I tried to buy some from other brokers. I tried to buy some from Western Fruit Growers.

Q. You did buy from Western Fruit Growers?

A. Yes, I bought one car from them late in the season.

Q. What other brokers did you try to buy from?

A. From C. H. Robinson and Jimmie Teel and W. W. Shipman. I bought from all of them.

Q. What California brokers did you try to buy from? A. I don't remember.

Q. Did you try to buy from any California brokers?

A. I never did have any special connection with California brokers. The brokers in Fort Worth or Dallas are the ones that made the connections. [47]

* * *

Q. Now, do you have here the written authorization that you gave to Mr. Margules or the Southwest Brokerage Company to buy this fruit?

A. What do you mean?

Mr. Pines: That is objected to on the grounds that it is hearsay.

The Court: Objection sustained.

(Testimony of Harry Bockstein.)

When did you first find out from the Southwest Brokerage Company, or when did you first find out that he had made some kind of a deal with Associated? After he mailed you that contract?

The Witness: Well, he talked to me before.

The Court: He talked to you before?

The Witness: To get my authority to make that deal. [49]

The Court: Did you ever give him any written authority?

The Witness: Well, I never did on anything.

The Court: You never did on anything?

The Witness: No, sir. I just talked to the broker over the telephone and then he sent me a confirmation and he signed it himself.

The Court: You never signed anything?

The Witness: No, sir. I never did on any of them.

The Court: Either to him or to anybody?

The Witness: Or to anybody else. That is the way business has been done all the time.

* * *

JOHN C. KAZANJIAN

called as a witness by and on behalf of the respondents under Rule 43(b), having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name?

The Witness: John C. Kazanjian.

The Clerk: Your address?

The Witness: Exeter, California. [50]

(Testimony of John C. Kazanjian.)

Direct Examination

By Mr. Wackerbarth:

* * *

Your Honor, we are calling him as an adverse witness also.

The Court: That is as to Crane, Associated?

Mr. Wackerbarth: Yes, your Honor.

The Court: Very well.

Q. (By Mr. Wackerbarth): Mr. Kazanjian, on the question of availability of Emperor grapes during the months of October, November and December, of 1944—I am going to direct my questions to along that line—what was your business occupation during the months of October, November and December, of 1944?

A. In October and November, up until November 10th, harvesting and packing and shipping grapes.

Q. And did you raise Emperor grapes?

A. Yes, I did.

Q. And did you raise the grapes that were involved, or would have been involved in this controversy had they been shipped? A. Yes, I did.

Q. As I understand it, up to October 10th there was a [51] ceiling covering these grapes?

A. That is right.

Q. After the ceiling was lifted, which I understand to be October 10th, were there other Emperor grapes available in the California markets?

A. Yes, there were.

(Testimony of John C. Kazanjian.)

Q. And in what markets were Emperor grapes available, in California?

A. Well, I had a lot to sell. We were selling them every day. Part of it was going into storage but the major portion of it was offered to the trade at the time of packing.

The Court: You mean there were grapes for sale outside of yours?

The Witness: Yes.

Q. (By Mr. Wackerbarth): What other companies or what other packing houses or vineyards, producers, do you know of in California that had Emperor grapes to sell during the months of October, November and December, of 1944?

A. Well, during October and up until part of November I imagine there was over 120 cars shipped out of Exeter alone per day.

The Court: At what other places were Emperor grapes for sale? [52]

* * *

A. Well, Growers Service in Exeter, Red Banner was packing and selling, Nash-De Camp, Cameo Vineyards located in Terra Bella, Sadoian Bros. and Anderson in Dinuba, Diamond K. Vineyard in Exeter, Bingham Holdings in Exeter, C. H. Brunner in Exeter, Allison-Brunner in Exeter—I could go on for 15 minutes more.

Q. (By Mr. Wackerbarth): To your knowledge did each and every one of these concerns that

(Testimony of John C. Kazanjian.)

you have mentioned have red Emperor grapes for sale during those periods of time?

A. To my knowledge every one of them had.

The Court: What is the period?

Mr. Wackerbarth: October, November and December of 1944.

The Witness: Now, I don't know what they had after the middle of November. The remarks I am making cover up to the middle of November because some of them finished packing at the middle of November and from there on they had [53] storage grapes. Now, how many of these firms I mentioned put grapes in storage I couldn't tell you now. But up until the middle of November there were fresh shipments going out and all these firms had grapes for sale.

Q. (By Mr. Wackerbarth): Do you know of any concerns that did put grapes in storage?

A. Yes, I do.

Q. During this time? A. Yes, I do.

Q. What companies put grapes in storage—and I have been referring to Emperor grapes?

A. Well, I would say almost every one of these that I mentioned had some portion of their grapes in storage. As a general practice they ship about two-thirds fresh and about one-third of it generally goes into storage. They gamble. In other words, there is quite a risk when you go into storage and they won't risk but about a third of their output in storage.

(Testimony of John C. Kazanjian.)

Q. That is cold storage? A. Yes.

Q. Now, do you know what red Emperor grapes were selling for per lug during the month of October, 1944, at Exeter?

The Court: Free on board? [54]

Q. (By Mr. Wackerbarth): F.o.b.?

A. We were getting around \$3.25 f.o.b. Exeter.

Q. During what period of time were you getting \$3.25 f.o.b. Exeter?

A. All the time that there were fresh shipments.

Q. And that was up to what date?

A. Up until the middle of November. The prices didn't go up until way late in storage.

The Court: What do you mean by "way late"?

The Witness: I mean about January and on; about the middle of January.

Q. (By Mr. Wackerbarth): Do you know what red Emperor grapes were selling for during the month of November, the latter half of November and the fore part of December, up as late as December 10th, red Emperor grapes that had been placed in storage—do you know what they were selling for in the Exeter district?

A. I would say about \$3.50.

Q. Do you know of any that were for sale at that time that had been placed in storage?

A. Well, a neighbor of mine, who is also a grower-shipper, Cameo Vineyards, I know they had some in storage. As a matter of fact, he went into storage in this same plant that we were contemplating going into storage. I know he had [55]

(Testimony of John C. Kazanjian.)

some grapes there. And there were grapes in all the storage plants.

The Court: For sale?

The Witness: For sale.

* * *

Q. (By Mr. Wackerbarth): Where grapes are customarily stored in California, placed in cold storage in California, what varieties of grapes are customarily placed in cold storage in California?

A. Well, in recent years they have tried all varieties, but the Emperors have been the major variety to go into storage.

The Court: You mean they have better keeping qualities?

The Witness: They have better keeping qualities. [56]

* * *

Q. (By Mr. Wackerbarth): It was your understanding of this contract, was it not, that these grapes were to go in storage?

A. If the contract was consummated; yes, we were going to go into storage.

Q. And that they were to come out of storage about [57] December 10th? A. That is right.

Q. And the grade of grapes going into storage was to be U. S. No. 1? A. That is right.

Q. By the way, how long have you been raising grapes and selling them?

* * *

A. Well, close to 30 years.

(Testimony of John C. Kazanjian.)

Q. How long have you engaged in the business of storing grapes for cold storage?

A. About 10 years.

Q. What has been your experience, or what is the experience of the trade generally in California and in the Exeter district, with reference to grapes going into storage as U. S. No. 1 and coming out of storage as U. S. No. 1? [58]

* * *

Q. Have you had any such experience?

A. Yes, I have had considerable experience. We all know that there is quite a bit of deterioration in storage, and of course a lot depends on the more you hold it, the longer you hold it, the greater the risk, but there is considerable deterioration. Three years ago I went into storage with 32 cars and came out with 5 cars, and lost 28 cars out of the 32. Now, that is way above average, but we have losses, considerable losses, over a period of years.

Q. Has it been your experience and has it been the experience of the trade in general in the Exeter district that a carload of grapes which goes in as U. S. No. 1, graded U. S. No. 1, will come out graded U. S. No. 1?

A. No, I have seen grapes go into storage that graded Fancy, which is above U. S. No. 1, that ended up in a winery because they spoiled.

It all depends on climatic conditions, maturity of the grapes—as a matter of fact, it is hard to tell just what it is, but sometimes you go into grapes

(Testimony of John C. Kazanjian.)

that look excellent, that go into storage, and you end up dumping them in the juice truck and sometimes Fair grapes hold up. It is hard to tell just why it is, but there is a big element of risk in [59] going into storage. That is why the ones that survive and come out always bring a premium to offset the damages done to those that fall along the wayside.

Q. Now, I will ask you if you have any recollection of the growing season of the year 1944, with reference to the Exeter district?

A. You mean in relation to keeping quality?

Q. I am going to get to that in a minute, but what I am directing your attention to particularly now is, do you know whether or not during the year 1944, on or about the 30th day of September of that year and on the first day of October of that year, whether or not there was a rainstorm in the Exeter district?

A. Well, ordinarily I wouldn't remember it, but I have checked into it and I know that it did rain that season.

Q. And did it rain on these grapes shortly before they were picked? A. Yes, it did.

Q. What has been your experience, and what has been the experience of the trade in general in the Exeter district, with reference to the keeping qualities of Emperor grapes in storage where they are placed in storage after they have been rained on?

(Testimony of John C. Kazanjian.)

A. They generally don't keep as well after they have been rained on. [60]

Q. That is, they don't hold up?

A. They don't hold up in storage as well.

Q. Now, is there a difference, Mr. Kazanjian, between the value of Emperor grapes in storage in October, U. S. No. 1s, and the value of U. S. No. 1s as of December 10th when, under the terms of this contract, they were to come out of storage?

A. I did not understand that question.

Q. Maybe I haven't made it clear?

You have heretofore testified that there is no assurance that U. S. 1s going into storage as U. S. 1s will come out the same way? A. That is right.

Q. Now, using that as a basis, I want to ask you whether or not you have an opinion as to the value of grapes as of December 10, 1944, that were U. S. 1s at the time they went in storage in October, on or about October 9, 1944; would you have any opinion as to the value of those grapes at the latter part, to wit, December 9, 1944?

A. Not at all. It would entirely depend on how they come out of storage.

Q. Then if the grapes that went in as U. S. 1s were moldy at the time they came out of storage, they wouldn't grade U. S. 1, would they?

A. No. [61]

Q. What in your opinion was the value, the market value, of grapes grading U. S. 1 as of December 9, 1944, at Exeter f.o.b. cars?

(Testimony of John C. Kazanjian.)

The Witness: I would say around \$3.50.

Q. Do you know whether or not there were grapes available for sale at that time?

A. I know there was.

The Court: U. S. 1s?

The Witness: Yes—Well, now, wait a minute. They would have to grade them before they are sure they are U. S. 1s.

* * *

Mr. Wackerbarth: Yes, I am assuming that they would meet a government inspection of U. S. 1.

The Witness: Well, now, all the grapes wouldn't have graded out of storage on December 9th, but I imagine a considerable portion of them would, and there was a lot of grapes in storage. [62]

* * *

Cross-Examination

By Mr. Hayhurst:

Q. Did you put in any Emperor grapes in storage in 1944 at all, Mr. Kazanjian?

A. No, I did not.

Q. And all of the grapes which you produced you packed and shipped yourself?

A. Yes, I did. [63]

* * *

Cross-Examination

By Mr. Pines:

* * *

Q. Are you familiar with the sales of U. S. Emperor grapes No. 1, inspected U. S. government

(Testimony of John C. Kazanjian.)

inspected, out of Exeter, California, between October 10, 1944, and December 10, 1944, ranging from \$4 to \$4.50 and \$5 per lug?

A. What was the range there in dates?

Q. The variable fluctuations that went as high as from \$4 to \$5 or more.

A. I mean the dates.

Q. Between October 10, 1944, the date that the ceiling price on grapes was lifted, and December 10, 1944, when these grapes were to be delivered out of storage.

A. No, I never heard of \$5 prices or anywhere near it. [67]

* * *

Q. What was the highest price that you are aware of that Emperor grapes, U. S. No. 1 inspection, sold out of Exeter, California, between October 10, 1944, and December 10, 1944?

A. Unless there was an exceptional pack, just a regular commercial U. S. 1 pack, I don't think there was any sales made over what I would say the range would have been, \$3.50 to \$3.75 at the most.

Mr. Pines: I move to strike the answer as not responsive to the question and that the witness be directed again to answer the question.

The Court: I think he has answered it.

Mr. Pines: He said except for an exceptional pack. I asked him what was the highest amount he was aware of that those grapes were sold for.

The Court: He said that for the usual run of

(Testimony of John C. Kazanjian.)

U. S. 1, and an exceptional pack would not be a U. S. 1, would it? [68]

The Witness: Well, yes, there are speciality packers, like Leonard Bros. in Fresno, and they will spend three times as much to grow their fruit and three times as much to pack it, and they get a premium for their grapes, but that is not an average commercial pack. I have seen them get \$6 a lug when the average price was \$2 or \$2.50 because he has something that is outstanding. That is what I had in mind when I said exceptional pack.

The Court: The exceptional pack, what did they sell for during this period?

The Witness: I don't know, but I say the commercial, what I mean by commercial brands, people that pack in volume, and normally what you would call U. S. 1 would be \$3.50 to \$3.75.

Q. (By Mr. Pines): You sold uninspected Emperor grapes during this period between October 10th and December 10, 1944 for \$3.25 and \$3.50, did you not?

A. Those are the records you want me to get, aren't they? I would rather wait and have the actual records. [69]

* * *

July 12, 1950; 10:00 A.M.

Mr. Wackerbarth: Yes, sir.

This motion probably should have been made yesterday at the conclusion of the plaintiff's case. However, I take it that under Rule 41, Subdivision (b)——

The Court: You can make it at any time.

Mr. Wackerbarth: —you can make it at any time.

The plaintiff now having closed its case, at this time I move to dismiss this action or proceeding as against Raymond M. Crane, doing business as Associated Fruit Distributors of California. Up to this point of time, your Honor, the plaintiffs have introduced as the basis of their proceeding against Crane and others the findings of the Department. Now while at this present time——

The Court: They have introduced the findings but they [74] have also introduced all of these depositions.

Mr. Wackerbarth: That is correct.

The Court: And testimony. I think that if you are going to make your motion I should probably pass on the admissibility of the evidence first? [75]

* * *

Mr. Wackerbarth: Now, in this particular instance, your Honor, Raymond M. Crane, my motion is to dismiss as to him, is shown to have, in my judgment, acted as a broker for the purchaser. [89]

* * *

The Court: Well, without prejudice to your right to renew it I will deny it at this time. I am not clear at this posture of the case whether or not there was an undisclosed principal for whom he was acting. [90]

* * *

Mr. Hayhurst: If the court please, at this time the respondent John C. Kazanjian, doing business

as the Red Lion Packing Company, also moves to dismiss the complaint. [91]

* * *

The Court: I will take your motion under submission and pass on it at the conclusion of the case.

You will proceed with your evidence.

Mr. Wackerbarth: Your Honor, there are a few other questions I would like to ask Mr. Bockstein.

* * *

HARRY BOCKSTEIN

recalled as a witness by and on behalf of the respondents under Rule 43(b), resumed the stand and testified further as follows.

Direct Examination

By Mr. Wackerbarth:

Q. Mr. Bockstein, in connection with the purchase of these grapes, was it your understanding that you were paying the Associated Fruit Distributors \$50 a car as procurement charge? [95]

* * *

The Witness: I understood that I was to pay \$50 a car.

Q. (By Mr. Wackerbarth): And what was your understanding as to why you were paying him \$50 a car?

* * *

The Witness: I was kind of buying brokerage, I guess. [96]

Q. (By Mr. Wackerbarth): You knew that he was procuring these grapes for you, did you not, for the West Texas Produce Company?

(Testimony of Harry Bockstein.)

A. It wasn't definitely specified to me whether he is procuring it or he is acting for the shipper. The only thing I knew, I had to pay \$50 a car to Mr. Crane, to Associated, as a procurement charge.

The Court: When did you first find out about it?

The Witness: When did I first find out about what?

The Court: About that you were to pay \$50 a car.

The Witness: That is the original sale.

The Court: When was that? Was that before October 10th?

The Witness: That was before October 3rd.

The Court: Before October 3rd?

The Witness: Yes, before I got a confirmation. That is when the purchase was made and that is when I give Southwest Brokerage Company instructions to buy. [97]

* * *

Q. (By Mr. Wackerbarth): And you knew that he had to get in touch with Red Lion Packing Company, didn't you, with reference to the sale of the grapes?

A. I don't know what to tell you. The only thing I know is the way the business is done in the produce line. It may be different than in any other line. Whenever a fellow offers you something for sale, and he tells you what it is going to cost you, that is all you are interested to know. You don't go to no details to find out whether this fellow is [103] going to work for you or work for the other fellow.

(Testimony of Harry Bockstein.)

The only thing I knew is what the grapes is going to cost me.

* * *

Q. And you knew that Red Lion owned the grapes on October 2nd, didn't you? A. Yes.

Q. And you knew that Mr. Crane had to contact Red Lion in connection with this sale, didn't you?

A. I didn't know. I thought maybe Red Lion was right at his office at the time. I couldn't tell. I was in Fort Worth and they were in [104] California.

* * *

Q. Now, Mr. Bockstein, I showed you yesterday an invoice from the Nash-De Camp Company.

A. Yes.

Q. When you were informed that Red Lion would not make this shipment, that was one of the carloads that you did buy, wasn't it?

A. I don't remember exactly, but I think that is a carload I bought from them afterwards. I bought it through C. H. Robinson of Fort Worth for \$3.50 plus storage charge.

Q. I am going to ask you to examine this deposition of yours. You recall your deposition being taken, do you not? A. Yes. [106]

* * *

Q. I want to direct your attention to Interrogatories 8 and 9. Now I am going to read to you, Mr. Bockstein, Interrogatory No. 8.

"Please state what quantity of grapes you

(Testimony of Harry Bockstein.)

purchased, and at what prices, in behalf of West Texas Produce Company after you received notice that Red Lion Packing Company and Associated Fruit Growers of California would not carry out their agreement, in an attempt to minimize your damage.”

Now, will you please read your answer?

A. “I purchased on the Dallas market on or about January 14, 1945, 150 lugs of grapes at \$4 per lug; on or about January 22, 1945, I purchased 1098 lugs of U. S. No. 1 Emperor grapes from Zaninovich Brothers, Orange Cove, California, through C. H. Robinson Company, brokers, at a price of \$5 [107] per lug delivered at a total of \$5490 for the car, the freight being \$518.84; on or about January 19, 1945, I purchased from Western Fruit Growers one car of U. S. No. 1 Emperor grapes containing 1105 lugs at \$4.25 per lug, totaling \$4696.25, and this car was divided 553 lugs to Central Fruit & Vegetable Company and 552 lugs to West Texas Produce Company; on or about October 24, 1944, for shipping date December 11, 1944, West Texas Produce Company purchased one car of U. S. No. 1 Emperor grapes containing 1100 lugs from Nash-De Camp Company, Berkeley, California, at \$3.50 per lug, aggregating \$3850, plus storage charges of \$156.25 charges plus insurance in an amount that I can't recall at this time.”

Q. Now, Mr. Bockstein, then these grapes that you did buy here as represented by that answer were what we call replacement grapes for the grapes

(Testimony of Harry Bockstein.)

that Red Lion didn't ship, is that correct?

A. Yes.

* * *

The Court: The long and short of it is, if Red Lion had shipped the grapes you would not have bought those? [108]

The Witness: That is right. I wouldn't have to buy.

* * *

Q. (By Mr. Wackerbarth): Now I want to show you a government inspection certificate in connection with this Nash-De Camp car and ask you if that is a photostatic copy of the inspection certificate which you received.

A. I couldn't tell you. [109]

* * *

Mr. Hoppenstein: We will stipulate that that is.

* * *

Mr. Wackerbarth: I will offer it in evidence at this time, your Honor.

* * *

(The document referred to was marked Respondents' Exhibit C and received in evidence.)

Q. (By Mr. Wackerbarth): You say Mr. Robinson was representing you at this time. I want to show you a telegram to Mr. Robinson from Nash-De Camp Company and ask you if that was one of the telegrams that went to him in connection with this Nash-De Camp purchase.

Mr. Hoppenstein: I will stipulate that it is.

(Testimony of Harry Bockstein.)

The Court: Exhibit D in evidence.

(The telegram referred to was marked Respondents' Exhibit D and received in [110] evidence.)

* * *

Q. That is the draft that was given in payment of this car, wasn't it?

Mr. Hoppenstein: We will stipulate that it was.

Mr. Wackerbarth: We offer that as the next exhibit.

The Clerk: Exhibit E.

(The document referred to was marked Respondents' Exhibit E and received in [111] evidence.)

* * *

Q. (By Mr. Wackerbarth): Did you order any other cars from the Nash-De Camp Company other than the one car you ordered on October 24th?

A. I don't remember. It is six years ago and too far back to remember.

Q. Did Nash-De Camp limit you at all to the one car? A. I believe he has.

Q. Is that telegram the only representations that your broker had from Nash-De Camp with reference to these cars?

A. I wouldn't know.

* * *

Q. Now you did buy another car from Western Fruit, didn't you? A. Yes. [112]

* * *

(Testimony of Harry Bockstein.)

Q. Who represented you in that deal?

A. I don't know if it was in Dallas.

Q. Didn't the Southwest Brokerage represent you in that deal?

A. Maybe so. I don't know. I can't remember.

Q. They were representing you in an effort to try and buy other cars?

A. We bought a lot of stuff through Southwest Brokerage.

Q. Now, I want to show you a telegram, a photo-static copy of a telegram, and ask you if that was a copy of the telegram that was sent to Southwest Brokerage in its effort to get replacement cars for you.

Mr. Hoppenstein: We will stipulate that it was.

The Court: And sent on or about the date it bears?

Mr. Hoppenstein: Yes, sir.

Mr. Wackerbarth: October 24th.

Mr. Hoppenstein: We will so stipulate.

* * *

The Court: Very well. That will be [113] Exhibit F.

(The telegram referred to was marked Respondent's Exhibit F and received in evidence.)

Q. (By Mr. Wackerbarth): Did you or the Southwest Brokerage Company take advantage of the offer made in that telegram for replacement cars?

(Testimony of Harry Bockstein.)

A. I can't remember that far back. I don't remember.

Q. You didn't buy anything from Heggblade-Margules Company, did you?

* * *

A. I don't know. All the dope is there.

* * *

Q. Can you tell us why you didn't take advantage of the offer to sell U. S. 1 grapes to you at that time of \$3.25 [114] a lug? [115]

* * *

Q. But you will state definitely that you did not buy any from Heggblade-Margules for replacement? A. Not for replacement, no, sir.

Q. Was your answer you don't know or you didn't? [116]

A. I didn't buy any from him for replacement. I was asking for grapes to be used in the winter.

Q. Now, my question to you is, why didn't you buy from Heggblade-Margules replacement grapes at \$3.25 a lug when they were offered to you?

Q. I just got through telling you a while ago. It is the same answer. I don't remember why I did. Maybe later on he turned it down. [117]

* * *

Direct Examination

By Mr. Hayhurst:

Q. Mr. Bockstein, you testified that you hadn't authorized the Southwest Brokerage Company in

(Testimony of Harry Bockstein.)

writing to purchase grapes for you and that you hadn't authorized anyone else in writing, is that correct?

* * *

A. That is right.

The Court: And you did not authorize Mr. Crane in writing?

The Witness: That is right.

The Court: What is your company, the West——

The Witness: West Texas Produce Company.

The Court: What is the name of the other one?

The Witness: Central Fruit & Vegetable Company.

The Court: That is owned by somebody [127] else?

The Witness: That is owned by Joe Mosesman and Morris Lipschitz and Mrs. Schwartz.

The Court: That is somebody else besides your company?

The Witness: That is right.

The Court: Did you do the business for the two companies in connection with these grapes?

The Witness: Both of us did; Joe Mosesman and I.

The Court: Both of you did?

The Witness: Yes. We did it together.

The Court: Did his company ever authorize you in writing to purchase these grapes?

The Witness: Well, I bought six cars.

The Court: No, did he ever authorize you?

(Testimony of Harry Bockstein.)

The Witness: No.

The Court: To purchase any grapes for him?

The Witness: No, we never did. Each one of us is authorized to buy from the other one.

The Court: The question is whether or not you authorized in writing.

The Witness: No. [128]

* * *

Q. (By Mr. Hayhurst): Mr. Bockstein, as I understood your answers, you have never authorized anyone in writing to negotiate or enter into a contract with Red Lion Packing Company for the purchase of the grapes that are involved in this controversy? [133]

A. I haven't in writing, but the only thing, the way it is customary to do over there, whenever the broker makes a deal he signs his name on the bottom, and he is my broker and that's it.

Mr. Hayhurst: We ask that the latter part of the answer be stricken.

The Court: The latter part may be stricken beginning with "it is customary."

* * *

The Court: Did you ever give any writing to Crane, either authorizing or approving his making of this contract with you?

The Witness: To Crane?

The Court: Of the supposed contract?

The Witness: In writing?

The Court: Yes.

(Testimony of Harry Bockstein.)

The Witness: No. [134]

The Court: Or to the Southwest Brokerage?

The Witness: No, I haven't.

The Court: Or to the Central Fruit & Vegetable Company?

The Witness: I don't know whether they have or not.

The Court: Very well.

Q. (By Mr. Hayhurst): Did you ever give one to the Red Lion Packing Company? A. No.

Q. Now, you stated, Mr. Bockstein, that you knew that Mr. Crane was selling for the Red Lion Packing Company? A. Yes.

Q. On October 3rd or October 2nd?

A. Yes.

Q. How did you know that?

A. After I seen a confirmation.

The Court: What do you call the confirmation?

Q. (By Mr. Hayhurst): Have you the confirmation here?

The Court: Is it that telegram you are referring to?

The Witness: No, the confirmation of Southwest Brokerage Company. Maybe he told me that over the telephone before he sent me the confirmation, but he sent me the confirmation.

Mr. Hoppenstein: That is the standard memorandum agreement attached to the complaint. [135]

The Witness: Standard Memorandum of Sales.

(Testimony of Harry Bockstein.)

The Court: That is dated October 3rd. When did you receive that?

The Witness: I don't know.

The Court: About when?

The Witness: It couldn't be any later than the 4th, the morning of the 4th, because it couldn't be any later because just from Dallas to Fort Worth is not too far. Maybe I was over in Dallas and got it that same day, I don't know.

Q. (By Mr. Hayhurst): In other words, that was the first notice that you had that Red Lion was involved?

A. Well, I wouldn't say that, but the only thing on that confirmation, that is when I seen Red Lion owned it and maybe I knowed that before. Of course I know Associated did not have the grapes themselves because if they would have had grapes themselves they couldn't charge me the \$50.

Q. You are referring to what is designated on the [136] document as the Standard Memorandum of Sale?

A. Yes, sir.

Q. It is on the heading of Southwest Brokerage Company, Fruit and Vegetable Division, 202-4 Produce Exchange Building?

A. That is right. [137]

* * *

Q. (By Mr. Hayhurst): Now, Mr. Bockstein, did you or any member of your firm ever sign such a Standard Memorandum of Sale?

Mr. Pines: Objected to on the ground that it is

(Testimony of Harry Bockstein.)

immaterial, irrelevant, and doesn't call for the signature of anybody.

The Witness: You don't customarily do that.

The Court: The objection is overruled.

Did you? Did you ever sign it?

The Witness: No.

Q. (By Mr. Hayhurst): Did you or any member of your firm ever sign a Standard Confirmation of Sale, Mr. Bockstein? A. No.

Q. Did you ever forward a confirmation to Red Lion Packing Company, any member of your firm or yourself? A. No.

Mr. Hayhurst: I think that is all.

The Court: Did you ever communicate directly with Associated Fruit Distributors, that is, Mr. Crane?

The Witness: No, sir.

The Court: Or do you know whether or not Central Fruit & Vegetable Company did?

The Witness: No.

The Court: You do not know? [138]

The Witness: No.

The Court: Very well. Do you have any questions?

Mr. Hoppenstein: Yes, your Honor.

Cross-Examination

By Mr. Hoppenstein:

Q. Mr. Bockstein, please state whether or not you ever authorized Mr. Margules of Southwest

(Testimony of Harry Bockstein.)

Brokerage Company to represent you in connection with the ten-car grape transaction?

Mr. Wackerbarth: Just a minute. We object to that on the ground, your Honor, that it is not the best evidence, that Section 2309 of the Civil Code of California provides that such authorization must be in writing, and the question of writing is not incorporated in the question and therefore it wouldn't be a valid representation in California even if he did do it, that is, by an oral authorization. So we object to it on the ground that it is not the best evidence and calling for a conclusion of the witness and immaterial.

Mr. Hayhurst: We join in the same objection.

The Court: The objection is sustained.

Q. (By Mr. Hoppenstein): Mr. Bockstein, did you ever discuss verbally with Mr. Margules of the Southwest Brokerage Company the purchase of six cars of grapes from Associated on or about October 2 or 3, 1944? [139]

Mr. Hayhurst: We object to that on the ground that it would be immaterial and not binding on the respondent Kazanjian, inasmuch as there is no testimony as yet that any such oral conversation, if had, was in the presence of the respondent Kazanjian.

The Court: The objection is sustained as to Kazanjian.

Mr. Wackerbarth: We interpose the same objection as we did before.

The Court: It is hearsay.

Mr. Wackerbarth: It wouldn't be a valid contract. But then I will accept the court's suggestion.

(Testimony of Harry Bockstein.)

The Court: I am not making a suggestion. You can waive it if you wish.

Mr. Wackerbarth: No, your Honor.

The Court: It is hearsay as to both respondents. The objection is sustained.

Q. (By Mr. Hoppenstein): Mr. Bockstein, please state whether or not Mr. Margules of Southwest Brokerage Company was authorized to act in your behalf in transacting business with Associated Fruit Distributors on or about October 2nd or 3rd, 1944?

Mr. Hayhurst: Same objection to the question that was previously asked and ruled upon.

Mr. Wackerbarth: Same objection on behalf of the respondent Crane. [140]

The Court: Same ruling. Objection sustained.

Q. (By Mr. Hoppenstein): Mr. Brockstein, did you receive the standard form memorandum agreement in writing from Mr. Margules on or about October 3rd or 4th, 1944?

* * *

A. Yes.

Q. Did you make any objection, either in writing or [141] verbally, to the terms set out in that instrument?

* * *

A. No, sir.

Q. Mr. Bockstein, at the time you received the memorandum from Southwest Brokerage, please state whether or not West Texas Produce Company

(Testimony of Harry Bockstein.)

was financially able to pay the \$1000 per car deposit for six cars of grapes.

Mr. Wackerbarth: That is objected to as calling for a conclusion of the witness and not the best evidence.

Mr. Hayhurst: Same objection.

The Court: Overruled. [142]

* * *

A. Yes.

Q. Did you have sufficient cash on deposit in the account of West Texas Produce Company?

A. I did.

Q. State whether or not you and West Texas Produce Company were financially able and had the cash available to pay the cost of the ten cars of grapes, six cars of grapes on the basis of \$2.50 per lug and \$50 per car procurement charge to Mr. Crane.

The Court: And 3 cents a lug to——

Q. (By Mr. Hoppenstein): And 3 cents a lug to Southwest Brokerage? Were you financially able? A. I was.

Q. Did the company have the cash on hand?

A. Yes, sir.

Q. Did it have on hand on or about December 10, 1944, the cash? A. Yes.

Q. Have you been ready, willing and able to pay for all the grapes and carry out your part of the terms as set forth in the instrument furnished to you by Southwest Brokerage? [143]

* * *

(Testimony of Harry Bockstein.)

A. I was.

* * *

Q. (By Mr. Hoppenstein): Mr. Bockstein, after you received notice that Red Lion would not ship the grapes did you make any effort to replace the grapes? A. I did.

Q. To whom did you direct your efforts to attempt to [144] replace the grapes?

A. I think it was Jimmie Teel Brokerage Company and one or two other brokers in Forth Worth.

Q. You did make efforts to replace them?

A. Yes.

The Court: That is, did you on or after October 10th—what was the date?

Mr. Hoppenstein: October 19th.

The Court: You fixed no time.

Q. (By Mr. Hoppenstein): On or about or after October 19th?

A. I can't fix no time because I can't remember that far back.

Q. You did make an effort to replace them?

A. Yes. [145]

* * *

July 12, 1950—2:00 P.M.

The Court: I would like to ask him one or two, if I may.

Mr. Bockstein, what was your understanding as to who was going to pay the storage on these grapes between the date of the contract and the date of delivery, December 10th?

(Testimony of Harry Bockstein.)

The Witness: Storage was supposed to be paid by the seller. I am not supposed to get them until December 11th. From then on it is mine. I am supposed to give them \$1000 a car deposit.

The Court: When?

The Witness: Just as soon as I get the U. S. No. 1 certificate. As soon as I get inspection.

The Court: When was it your understanding that that inspection [154] was to be made?

The Witness: Just as soon as they would get the grapes ready.

The Court: As soon as they are in the car?

The Witness: I don't know. When they get the grapes ready.

The Court: Or when they go in storage?

The Witness: I don't know. But when I get a government inspection that is when I was supposed to give them \$1000 for each car and he put it into storage.

The Court: You did not know whether you were to get a government inspection when they were put in storage or when they came out on December 10th?

The Witness: No. I was supposed to get inspection before they go into storage, just when they are loaded in a car, whenever that is.

The Court: What was your understanding about where they were going to be stored? In a freight car?

The Witness: No, they were going to be stored in a cold storage house here in Los Angeles, I think.

(Testimony of Harry Bockstein.)

The Court: Was it your understanding that you were to get that when they were put in storage here or when they were put in the freight car to be shipped to you, that is, that you were to get the certificate?

The Witness: Just as soon as the government man inspects [155] and gives them a U. S. certificate for No. 1. Then I am supposed to pay \$1000. Then on December 11th I am to pay the rest of it.

The Court: Then you had no idea whether or not you were to get that inspection certificate any time between October 3rd, or whatever date it was, and December 10th?

The Witness: That is right.

* * *

Redirect Examination

By Mr. Wackerbarth:

Q. Mr. Bockstein, didn't you understand that the grapes were to go in storage on October 9th, they were to start storing two cars a week commencing October 9th?

A. I don't know. It didn't make no difference to me.

Q. Didn't your agent call that to your attention? The original telegram of October 26th provided that they were to go in storage at that time.

A. Well, the agent is in Dallas and I am at Fort Worth, and I didn't know. The only thing I knew of, I am supposed to give them \$1000 per car when

(Testimony of Harry Bockstein.)

I get a government inspection that they are U. S. No. 1 grapes.

The Court: Then your understanding of the transaction was that set forth in this Standard Memorandum of Sale? [156]

The Witness: That's right. [157]

* * *

The Court: Was it your understanding that the government inspection report was to be made as per each freight car?

The Witness: That is right. That is the way it is supposed to be. Otherwise the government inspector would not inspect.

The Court: What does it mean, "new lidded display lugs"?

The Witness: That is a certain kind of lug like they pack in California.

The Court: It is a special kind of lug?

The Witness: It is a certain lug. It is not a common lug like we use all the time, a grape lug, but it is just different from a tomato lug. Most of them pack it that way, the majority of the grapes at that time.

The Court: Then may I ask this: Was it your understanding that if anything happened to the grapes prior to December 10th that it would not be your loss?

The Witness: Yes, sir, it would have been my loss.

The Court: If they had burned up?

(Testimony of Harry Bockstein.)

The Witness: If they had burned up it would have been my loss; yes, sir.

The Court: Before December 10th?

The Witness: Before December 10th; yes. [158]

The Court: Before the title was transferred to you?

The Witness: When they put them in storage they take out the insurance on them and then it would be protected.

The Court: Very well.

Q. (By Mr. Wackerbarth): Did you ever see the original telegram that Mr. Crane sent to Southwest Brokerage in which these grapes were offered for sale? A. I don't remember.

Q. I will show you a photostatic copy of the telegram. That is just a list of the parties to whom it was sent.

The Court: Which one is that now?

Mr. Wackerbarth: The September 26th telegram, your Honor.

The Court: That is the September 26th telegram which starts out with, "Can book Emperors 9 cars"?

Mr. Wackerbarth: Yes, your Honor.

* * *

The Witness: I don't remember if I have seen that or [159] not. I imagine I haven't because I was in Forth Worth.

Q. (By Mr. Wackerbarth): Mr. Margules told you about it, didn't he? A. Yes.

(Testimony of Harry Bockstein.)

Q. And told you what offer he had had?

A. Yes.

Q. Now I want to direct your attention to these words of the telegram:

“Can Book Emperors Nine Cars U. S. 1, Nine Cars Unclassified or Eighteen Cars Vineyard-Run. Grade to Go Into Storage Packing to Commence Rate of One or Two Daily, October Ninth.”

Now it was your understanding that they were going to start putting them into storage on October 9th, wasn't it?

A. I tell you I didn't take very much interest in it, the date they were supposed to go into storage, because I wasn't going to get them until December 11th anyway.

Q. You knew that they were to be inspected as of the day they went into storage?

A. That is right. They were inspected the day they were to go into storage.

Q. Not inspected the day they came out of storage?

A. No, sir. All the storage risk is ours. [160]

* * *

The Court: I would like to ask a question. With relation to the telegram of October 2nd sent by Associated to Southwest Brokerage, which reads as follows:

“Secured Red Lion Packing Company Confirmation Ten Cars Grapes. As Outlined, You

(Testimony of Harry Bockstein.)

Collect Deposits to Be Forwarded to Us Soon
DUPJA Wired Each Car."

Mr. Wackerbarth: "DUPJA" is a code word that means government inspection.

The Court: This is what I do not understand: "Soon as Government inspection wired each car."

Mr. Wackerbarth: As soon as government inspection is wired to them as to the contents of each car. [161]

* * *

JOHN C. KAZANJIAN

recalled as a witness by and on behalf of the respondents under Rule 43(b), having been previously duly sworn, resumed the stand and testified further as follows: [162]

Redirect Examination

By Mr. Wackerbarth:

* * *

Q. Did you find any records at all, Mr. Kazanjian? A. Yes, I did.

Q. And what records did you find?

A. I found a complete record on all the sales of Emperors, the car numbers, the sale numbers, the check numbers and the party that sold it. It is a complete record.

The Court: During what period?

The Witness: During the Emperor harvest season of 1944. [163]

* * *

(Testimony of John C. Kazanjian.)

Q. (By Mr. Wackerbarth): Will you please produce them in court?

A. (Producing documents.)

The Court: Those are the records of your sales?

The Witness: Yes.

Q. (By Mr. Wackerbarth): Will you please show us the records that you have of the sales commencing October 9th? [164]

* * *

Q. Now I will show you a document, which I will mark G-1. What is that, Mr. Kazanjian?

A. That is a summary of all the sales made from October 10th to October 30th, which include all the days and all the cars, all the days that I packed grapes and all the cars of Emperor grapes that were packed for that season, for the season of '44.

* * *

The Court: Was that prepared from your records?

The Witness: Yes.

The Court: By someone in your employ?

The Witness: By my bookkeeper.

The Court: Is she under your direction and control?

The Witness: Yes.

The Court: In the ordinary course of business, was that [165] prepared?

The Witness: Yes.

The Court: You did not prepare it just last night?

(Testimony of John C. Kazanjian.)

The Witness: No, it was prepared in—it was two years ago. It was prepared for the Denunzio case.

The Court: Very well.

Q. (By Mr. Wackerbarth): Do you have the supporting documents here that go to support those records?

A. I have some, but it is not complete. I drove all the way back yesterday to get these records. Now this was prepared for the Denunzio case and we couldn't locate the originals. Whether it went in on the Denunzio case or not, I don't know. But I have five inspection certificates, I have nine account sales reports from Associated Fruit, and there is one invoice complete, but the rest of them I couldn't locate. [166]

* * *

The Court: While you are looking through that, I will ask the witness a question on another subject.

You testified you had been in the grape business for some years and had stored from time to time?

The Witness: Yes, I have.

The Court: What is the storage rate? Is it per crate or per square foot or per ton or what?

The Witness: No, it is per package.

The Court: Per package?

The Witness: Yes. [167]

The Court: When they are put in cold storage for the market they are crated first, are they?

(Testimony of John C. Kazanjian.)

The Witness: Yes, they are.

The Court: Then what is the storage rate per package?

The Witness: It is generally about 7 cents going in and 5 cents a month thereafter.

The Court: So that the storage rate on these grapes would have been 12 cents—no, it would have been more than that—it would have been for October, November and December. That would be two months?

The Witness: They charge you a full month when it is part of a month, so it would be for October, November and December.

The Court: 15 cents plus 7 cents, or 22 cents a crate storage to make delivery of these on December 10th?

The Witness: That is right.

Mr. Pines: May I suggest we are speaking of lugs rather than a crate?

The Court: A lug.

The Witness: A lug. [168]

* * *

Mr. Wackerbarth: Now we offer this tabulation in evidence as a tabulation by the witness of his sales for the [170] period covered by the tabulation.

The Court: Admitted.

The Clerk: That is Exhibit G-1.

(The tabulation referred to was marked Respondents' Exhibit G-1 and received in evidence.)

* * *

(Testimony of John C. Kazanjian.)

Mr. Wackerbarth: We will offer these for identification at this time so that they may be gone into in detail.

The Court: Very well.

Now on this document it says 296, 297, 296, etc. Is that the price per crate?

The Witness: Per package.

The Court: Is that a lug?

The Witness: A lug. I worked that out last night. That part of it I worked out last night, but the typewriting was already in my files.

The Court: Very well. Had you finished?

Mr. Wackerbarth: Yes, your Honor.

The Court: In view of the depositions of this witness [171] there are some questions that were touched on there and I would like to ask him, subject to any objection counsel might have.

Mr. Crane testified in his deposition that he talked to you on the telephone about October 2nd or 3rd and then sent you a wire that he had sold—well, this wire here, which is not identified by an exhibit number but it is the wire of October 3rd addressed to you, addressed to Red Lion at Exeter, and you testified that you talked to him. Was there any discussion in that telephone conversation between you and Mr. Crane concerning storage or the payment of storage?

Does anybody want to object to the question? (No response.)

Did you have any conversation with him concerning storage and who was going to pay for it?

(Testimony of John C. Kazanjian.)

The Witness: We had been discussing this storage deal for about two weeks. Now whether we discussed it on the 2nd or 3rd I couldn't honestly say, but we had been discussing this for some time, and we had discussed the method of payment. I insisted on payment in Exeter at the time of packing. In other words, I wanted that \$1000—originally it was supposed to be all cash in Exeter.

The Court: I am just talking now about the storage, whether or not you had any discussion there concerning that. You do not recall whether you did or not? [172]

The Witness: You mean the storage fee?

The Court: Yes.

The Witness: On the storage fee, it was supposed to be paid by either Crane or myself. We never settled who was going to pay. I mean, eventually it was going to be charged to me, but whether he was going to pay that——

The Court: In your wire to him of October 4th, you say "you to arrange for storage as agreed." He mentions nothing about storage in his other wire. I do not know what that means.

The Witness: Well, storage space was hard to find and he was going to find storage space. You to arrange storage, that is what I had in mind, you to find storage space.

* * *

(Testimony of John C. Kazanjian.)

Recross-Examination

By Mr. Hoppenstein:

Q. Mr. Kazanjian, when Mr. Crane talked to you on the telephone prior to his sending you the telegram of October 3, 1944, it is true, is it not, that he told you about the offer from Southwest Brokerage, Mr. Jay Margules of Dallas, Texas?

A. No, that is not true. He never mentioned names. He never told me who he was dealing with at any time. [173]

Q. What did he tell you?

A. He told me he was trying to arrange the storage deal.

* * *

Q. What did he tell you, Mr. Kazanjian?

A. Now Mr. Crane and I talked pretty nearly every day, and sometimes two or three times a day. Now what conversation you are referring to I honestly don't know.

Q. With reference to the 10 cars of U. S. No. 1 Emperor grapes at a price of \$2.50 net to you with \$1000 deposit for those 10 cars.

A. It wasn't 10 cars. We were discussing 15 cars at all times. It was never 10 cars.

Q. Isn't it true that Mr. Crane discussed with you on the telephone the sale of 10 cars with \$1000 deposit and 5 [174] cars on another transaction at \$750?

A. No names were mentioned and he was work-

(Testimony of John C. Kazanjian.)

ing on 15 cars. Not until I received the wire did I know that it was broken down into 10 and 5.

Q. It is your testimony, then, that prior to your receiving the telegram of October 3, 1944, Mr. Crane did not discuss with you two different sales of 10 and 5?

A. Not to my recollection, and no names, certainly no names, were ever mentioned.

Q. Did he discuss with you the matter of a \$750 deposit for one group of cars and a \$1000 deposit for another group of cars?

A. He might have, but no names were mentioned. I didn't know who he was dealing for or with at any time.

Q. My question, Mr. Kazanjian, is not——

The Court: He said he might have.

Mr. Hoppenstein: All right.

Q. You did in that telephone conversation tell Mr. Crane, did you not, that he could sell 10 of them with \$1000 deposit and 5 of them with a \$750 deposit, did you not?

A. I had more than one condition in that. When we were dealing on the storage there was more than one condition involved. It wasn't only a matter of \$1000 or \$500; the question was, who was assuming the risk in storage and the payments, whether the payments were in Exeter or to come from [175] some unknown party three or four weeks later. There were a lot of things involved. It wasn't just a matter of \$1000.

(Testimony of John C. Kazanjian.)

Q. Will you tell the court what that conversation was?

A. I can't tell you because I don't know which conversation you are talking about.

Q. The telephone conversation prior to your receiving the telegram of October 3, 1944.

A. I would say we discussed that storage deal at least 15 times before that wire because we talked back and forth every day, sometimes as much as four times a day. Now, you talk about one particular conversation and you don't identify which one.

Q. Mr. Kazanjian, you did receive a telegram, did you not, from Mr. Crane dated October 3, 1944, reading:

“Referring Telephone Have Sold for Your Account Basis \$2.50 Lug Net to You Block Emperors Mentioned Five Cars Basis \$750 Car Deposit, Ten Cars Basis \$1000 Deposit to Be Paid Upon Receipt U. S. 1 Government Inspections * * *”

Now you received that telegram, did you not?

A. Yes, I did.

Q. The telephone conversation referred to in that telegram, will you tell the court what that was?

The Court: You mean all of them? He said there were 10 or 15 of them. [176]

Q. (By Mr. Hoppenstein): Immediately before you received the October 3, 1944, telegram.

(Testimony of John C. Kazanjian.)

A. You want to know the contents of that conversation?

Q. Yes.

A. Which conversation is that? I mean the one that that refers to? It could have been the day before, it could have been a week before, but I don't think that that makes much difference, but I can go into what we did discuss when we did discuss the storage, if that is what you want.

Q. I am talking about the telephone conversation referred to in this telegram of October 3rd, Mr. Kazanjian.

The Court: Tell us all the conversations you had.

The Witness: All right. I will tell you how the whole thing started.

Ray called up and wanted to know if I was interested in putting some grapes in storage, and I told him if he had some storage space and could arrange for the right deal I would.

Now, we were operating, mind you, under a ceiling where it wasn't good business——

The Court: No, no. He just wants the conversation.

The Witness: All right.

Ray proposed a storage deal. He said he had some storage space and I said I would be interested if the conditions were right. And I named the conditions that I wanted. [177]

The Court: What did you tell him?

The Witness: I told him that I wanted my payment in Exeter. That is the thing that I had in-

(Testimony of John C. Kazanjian.)

sisted on because right next door to me a tomato shed went broke on a good year because they owed——

The Court: Did you tell him that?

The Witness: Yes.

The Court: Very well.

The Witness: Because the tomato shed went broke because the parties he sold to owed them \$32,000 when he got through and the tomatoes were bringing good money, so I wanted to be sure that I had my money right there in Exeter at the time while I still had physical possession of my grapes.

Now I might have been very naive——

The Court: Did you tell him that?

The Witness: I am telling you what I told him.

The Court: You did not tell him you might be naive, did you?

The Witness: I wouldn't be surprised. Maybe not in those words, but the things that I insisted on—he wanted me to tie in all the rest of my grapes. He was going to give me the storage space because storage was scarce if I would give him the balance of my business. Now that is something that I didn't want to commit myself to at the time. That was one of the conditions. [178]

The other condition was that I wanted my payment in Exeter.

The other condition was that they were to take the inspection in Exeter. I wanted it clear that it wasn't going to be inspected out of storage or any

(Testimony of John C. Kazanjian.)

other place. The inspection was to take place at the place of packing.

Now those were the three major things I insisted on. And when I got the wire from him, not one of those was clear and not one of those terms was satisfactory.

Q. (By Mr. Hoppenstein): I didn't ask you that.

A. Excuse me.

Q. I just want the telephone conversation.

The Court: Did you say anything in the telephone conversation about new lidded display lugs?

The Witness: I have never packed a display lug and he never mentioned to me that he wanted a display lug. I have a plain lug. It is not a display lug. I have never since I have been in the packing business packed a display lug. I didn't know until today that a display lug was mentioned, until five minutes ago.

Q. Mr. Kazanjian, the telegram that Mr. Crane sent you on September 26, 1944, you were acquainted with that telegram, were you not, that Mr. Crane sent to various brokers?

The Court: Show it to him. [179]

* * *

Q. The first telegram that Mr. Crane sent out.

A. You ask me if I was acquainted with this?

Q. Yes.

A. Absolutely not. I never had any idea he sent it.

Q. You never knew that Mr. Crane had sent that telegram?

A. No.

(Testimony of John C. Kazanjian.)

Q. You never gave him the terms of \$2.53 net to the shipper?

A. That was the ceiling. I didn't have to give him that.

Q. I asked you if you gave him that.

A. I don't remember, but it was the ceiling. That naturally would be the price if we were going to make a deal.

Q. Did you originally tell Mr. Crane that you had unclassified or vineyard-run grapes to sell?

A. We have all varieties. There is not a vineyard that doesn't have all.

Q. Did Mr. Crane ever notify you that he had a purchaser of 10 cars of U. S. 1 grapes at \$2.50 per lug net to you with a \$1000 deposit?

A. That is that October 4th wire, isn't it?

Q. Did he ever tell you that by telephone? [180]

A. Not that I remember; no.

Q. Do you deny that he told you that?

A. I say not that I remember.

Q. He might have told you?

A. He may have, yes, and he may not.

The Court: If I understand your testimony, your conversation with Crane always was about 15 cars?

The Witness: Fifteen cars is what we dealt with.

The Court: Ten might be \$1000 or five might be \$750, but it was always about 15 cars?

The Witness: Absolutely right.

Q. (By Mr. Hoppenstein): When you received

(Testimony of John C. Kazanjian.)

the telegram from Mr. Crane of October 3rd advising that he had sold for your account the 15 cars, did you notify Mr. Crane that that sale was not satisfactory?

A. Which wire is that? October 3rd?

Q. October 3rd.

A. Yes, I indicated that by my return wire.

Q. You indicated that?

A. Well, I made it plain as pie. I insisted on my old terms and indicated that his terms were not satisfactory.

Q. Mr. Kazanjian, will you point out in your telegram—you replied by telegram of October 4th?

A. Yes, I did. [181]

Q. Did you have any telephone conversation about it?

A. We talked at least two or three times every day.

Q. After the telegram of October 3rd and prior to your telegram of October 4th, did you talk to him by telephone on it?

A. Every day before and after.

Q. Did you discuss this sale of the 10 cars and the 5 cars with him?

A. After the 4th, yes, we talked.

Q. Prior to your telegram of October 4th, did you tell him by telephone that his sale was not satisfactory?

* * *

The Witness: No, I did not.

(Testimony of John C. Kazanjian.)

The Court: But you did talk to him after you sent the wire?

The Witness: He called me up after he received the wire.

The Court: That day?

The Witness: I think it was that day or the next day.

The Court: What went on in that [182] conversation?

The Witness: We discussed this new terms and he said he would contact the people he had been negotiating with and he felt certain that he could arrange the deal.

The Court: On the 15 cars?

The Witness: On the 15 cars, or whatever was in that October 3rd wire.

The Court: That is 15 cars.

The Witness: And he was to send his man Hoover to come over there and straighten things out. That was the last conversation. And then the next thing the ceilings went off.

The Court: Did Hoover come?

The Witness: Hoover came.

The Court: To see you?

The Witness: He got there the day after the ceilings went off.

The Court: Very well.

Q. (By Mr. Hoppenstein): Did Mr. Crane tell you that he had wired Southwest Brokerage of Dallas that he had secured your confirmation of the sale of 10 cars?

(Testimony of John C. Kazanjian.)

A. Mr. Crane never told me who he was doing business with; never.

Q. Did he tell you that he had confirmed a sale for Red Lion of 10 cars?

A. In the wire you mean or telephone? [183]

Q. By telephone. A. Before October 3rd?

Q. Yes. A. No.

Q. Before October 4th? A. No.

Q. He did not tell you that? A. No.

Q. Did he tell you that in a telephone conversation on October 4th? A. No.

Q. Did he tell it to you on October 5th?

A. We discussed the wire that I sent on October 5th, I think it was, or October 4th.

Q. Now I show you your October 4th wire to Associated. Did you sign that wire, Mr. Kazanjian?

A. I think I did.

Q. Am I reading correctly:

“Fifteen Cars Storage U. S. 1 Emperors
December Tenth Conversion Satisfactory at
Two Dollars and Fifty Cents F. O. B. Exeter
Guaranty by Buyer. One Thousand Dollars
Deposit on Ten Cars and Seven Hundred Fifty
Dollars on Five Cars Said Deposit to Be Paid
Immediately on Inspection at Shipping [184]
Point.”

A. That is right.

Mr. Hayhurst: Will you read the rest of that wire, Mr. Hoppenstein?

Mr. Hoppenstein: Yes, sir. I would be glad to.

(Testimony of John C. Kazanjian.)

“You to Arrange for Storage as Agreed.
Balance of Pack Intend to Load After October
20th. Will Be Glad to Make Deal on Same
About the Fifteenth of October.”

Q. Now will you please point out in that wire where you stated to Mr. Crane that his sale for your account basis \$2.50 lug net to you block of Emperors mentioned 5-car basis \$750 car deposit 10-car basis \$1000 deposit to be paid upon receipt of U. S. 1 government inspections, is different and where you pointed out that that was not satisfactory to you?

Mr. Hayhurst: We will object to that on the ground it is argumentative.

The Court: Objection sustained.

* * *

Redirect Examination

By Mr. Hayhurst:

* * *

Q. Did you authorize Mr. Crane or the Associated Fruit Distributors in writing on or before October 4, 1944, to sell Emperor grapes to either one of the complainants in this action?

The Court: Or to the Southwest Brokerage Company?

Mr. Hayhurst: Or to the Southwest Brokerage Company?

Mr. Pines: To which we object on the ground it is incompetent, irrelevant and immaterial. The fact that there was authorization, or rather the transaction, is already in evidence.

(Testimony of John C. Kazanjian.)

The Court: Overruled.

The Witness: No, I did not.

The Court: Did you ever execute any writing to Mr. Crane in connection with this transaction?

The Witness: No, I did not.

The Court: Other than the telegram?

The Witness: No. [186]

The Court: Did you ever execute any writing in connection with this transaction to the Southwest Brokerage Company?

The Witness: No, I did not.

The Court: To the West Texas Produce Company and Central Fruit & Vegetable Company?

The Witness: No, I did not.

Q. (By Mr. Hayhurst): The wire of Associated Fruit Distributors to you dated October 3rd states:

“Will Forward Confirmation for Your Signature Soon as Received Air Mail From Buyers.”

Did you ever receive from the Associated Fruit Distributors or Mr. Crane any confirmations of this sale other than this wire of October 3, 1944?

The Court: Any written confirmation?

Mr. Hayhurst: Any written confirmation.

The Witness: No, I did not.

The Court: Did you ever receive any document from him?

The Witness: No, I did not.

The Court: Asking for your signature?

(Testimony of John C. Kazanjian.)

The Witness: I did not.

The Court: Did you ever receive any writing from him executed by him or by the Southwest Brokerage or West Texas or Central Fruit & Vegetable wherein they stated that they [187] would buy these?

The Witness: No.

The Court: Ten cars or 15 cars or anything else?

The Witness: No, I never did know who the people were.

The Court: Did you ever receive any documents, is what I am asking you.

The Witness: No, I did not.

Mr. Pines: Does the court mean other than the October 3rd telegram?

The Court: Other than the October 3rd telegram.

The Witness: No, I did not.

Q. (By Mr. Hayhurst): Did you receive any confirmation or written documents other than the October 3rd letter?

The Court: October 3rd letter?

Q. (By Mr. Hayhurst): October 3rd telegram, from the Central Fruit & Vegetable Company or the West Texas Produce Company or the Southwest Brokerage Company?

A. No, I did not. [188]

* * *

Q. And with reference to Exhibit G-1, just as a matter of explanation, the prices set forth and the

(Testimony of John C. Kazanjian.)

amount received, are those the net prices received by you?

A. Yes, those are the net prices received by me in this column right here.

Q. And the sales price then would have had in addition to that a commission charge?

A. After the ceilings went off we were paying, I think Mr. Crane was getting from \$40 to \$50 a car.

Q. So that in most of these cases where the sale would be indicated as 2.97——

A. That means a \$3 sale.

Q. Yes.

I don't think that that was made clear in the testimony before.

The Court: No, it was not. [189]

* * *

RAYMOND M. CRANE

called as a witness by and on behalf of the respondents, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name, please?

The Witness: Raymond M. Crane. [190]

* * *

Direct Examination

By Mr. Wackerbarth:

Q. Mr. Crane, you are one of the defendants in this action? A. Yes, sir.

(Testimony of Raymond M. Crane.)

Q. And you do business under the name of Associated Fruit Distributors of California?

A. I did at the time of this action.

* * *

Q. You are the party referred to in these telegrams here as Crane and Associated Fruit Distributors?

A. Yes, sir.

* * *

Q. Now, Mr. Crane, do you recall the occasion of you sending a telegram to Southwest Brokerage stating that Red Lion took the position that the ceilings being lifted that the contract was no longer binding? [191]

A. Yes, sir.

Q. And that was about October, shortly after October 9th or 10th, the date of the lifting of the ceilings?

A. Yes.

Q. Now, with reference to that date, Mr. Crane, I will ask you: Were you at that time selling Emperor grapes by carload lots?

A. Yes, sir.

Q. And were other brokers in Los Angeles selling grapes in carload lots?

A. Yes, sir.

Q. And do you have a way of determining from any records which are maintained by the trade or industry sales that are being made from time to time of these grapes?

A. It is published daily in the Federal Market News Service, the general f.o.b. shipping point quotations.

Q. Mr. Crane, I show you here certain market reports. Can you identify those market reports

(Testimony of Raymond M. Crane.)

issued by the produce trade during the year of 1944?

The Court: Let us have them marked as I.

(The documents referred to were marked Respondents' Exhibit I for identification.)

The Witness: Yes, these are Market News Service Reports issued by the U. S. Department of Agriculture. [192]

Q. (By Mr. Wackerbarth): You have examined those, have you, Mr. Crane? A. Yes, sir.

Q. Is it necessary to refresh your recollection from those documents in order to determine the market price or the selling price of Emperor grapes for the months of October, November and December, 1944?

A. I haven't checked these records, but I know what my recollection of the market was at that time.

Q. What other brokerage houses in and about Los Angeles or the state of California were selling red Emperor grapes during the months of October, November and December, of 1944, to your knowledge?

A. A. Arena Company, Pacific Coast Fruit Distributors, Nash-De Camp.

Q. American Fruit Growers?

A. American Fruit Growers.

Q. Heggblade? A. Heggblade-Margules.

Q. Western Fruit Growers?

A. Western Fruit Growers.

(Testimony of Raymond M. Crane.)

Q. Any others that you recall?

A. Well, there are several others that handle them. I can't recall offhand.

Q. Do you recall what the red Emperor grapes were selling [193] for in carload lots where they had U. S. 1 during the month of October, 1944?

Mr. Hoppenstein: Your Honor please, we would like to urge an objection at this time with reference to the date of October, 1944, on the grounds that it is immaterial and irrelevant; that the time would be the date of performance to wit, December 10, 1944.

The Court: I have not made my final ruling yet as to whether or not if there was a contract the failure to perform was concurred in by the complainants. I will overrule the objection, subject to a motion to strike, in the event that your contention is correct.

* * *

Q. (By Mr. Wackerbarth): Do you have any knowledge at this time, Mr. Crane, as to what red Emperor grapes were selling for during the month of October for the purposes of storage and sale at a later date?

A. Generally \$3.

Q. I am first asking if you have any knowledge.

A. Yes, I do.

Q. What was the market value or the reasonable market value of red Emperor grapes during the month of October, 1944 [194] for delivery into storage and removal at a later date, that is, U. S. No. 1 grapes?

A. Generally \$3; some \$3.25.

(Testimony of Raymond M. Crane.)

Q. Did you have any that you were selling at that time? A. Yes, I believe we did.

Q. Do you know of any other brokers that were selling them at that price?

A. I think that was the general market quotations except as testified here previously, except for some outstanding labels, the market was generally \$3 to \$3.25.

* * *

Q. Do you recall, Mr. Crane, what these grapes were selling for to be placed in storage during the month of November, [195] 1944, that is, the market price on U. S. 1s?

A. Well, there wasn't any appreciable rise in the market value, and in November most of the grapes had been put into storage, as far as U. S. No. 1 quality was concerned. The question of whether or not grapes put into storage in October would be U. S. No. 1 when they come out would be a different thing.

Q. I am going to take that up with you in a minute. I am asking if you knew what the price was in November of these U. S. 1s for the purpose of going into storage.

A. Well, the market was generally \$3 to \$3.25 at that time.

Q. Did you have them for sale at that price?

A. Yes, sir.

Q. Do you know of any others that had been for sale at that price?

(Testimony of Raymond M. Crane.)

A. All distributors were quoting and delivering at that price at that time.

Q. And was Arena quoting and delivering at those prices? A. Yes, sir.

Q. Nash-De Camp? A. Yes, sir. [196]

* * *

Q. Now, Mr. Crane, as to the month of December, 1944, did you have occasion to quote red Emperor grapes to buyers in the Eastern market?

A. Yes, we were quoting daily.

Q. Did you quote any red Emperor grapes at that time? A. Yes.

Q. I have shown to counsel, and I am showing to you at this time, Mr. Crane, what appears to be a photostatic copy of an Associated Fruit Distributors bulletin which you sent out. [198]

* * *

Q. Now directing your attention to this bulletin, is that a photostatic copy of one that you sent to the trade generally? A. Yes, sir.

Q. And what did you quote there, Mr. Crane?

A. We quoted 2 to 3 cars of U. S. No. 1 from storage, subject to ability of making grade, at \$4.15 net.

Q. Was that quotation of \$4.15 net for Emperor grapes that graded U. S. 1 out of storage?

A. Yes.

The Court: That is f.o.b.?

The Witness: F.o.b.; yes.

The Court: That meant including storage?

The Witness: That included storage and subject

(Testimony of Raymond M. Crane.)

to ability of making grade.

The Court: These other prices here in October and November were ex-storage? They did not include storage? [199]

The Witness: They didn't include storage. They were f.o.b. without storage.

The Court: Very well.

Q. (By Mr. Wackerbarth): What were the government quotations on these Emperor grapes during that period of October and November?

A. In November?

Q. October and November. Have you checked them?

A. Well, the market on grapes was generally \$3 to \$3.25 during the entire period.

Q. And is that the prices that were being quoted in these government reports?

A. Yes. [200]

* * *

Q. You have already testified, I think, to the fact that it did represent the grapes as they went out of storage? A. Yes.

Q. Now, Mr. Crane, when you sent out this original telegram of September 26th, do you recall the contents of that telegram?

A. I think the telegram speaks for itself.

Q. I wish you would please examine this photostatic copy of the telegram and tell me whether or not there was any request for a confirmation by the buyer in that instance.

The Court: What was that?

(Testimony of Raymond M. Crane.)

Mr. Wackerbarth: Was there any request or any demand in that telegram for a confirmation by the buyer of any purchase?

The Court: Does not the telegram speak for itself?

Mr. Wackerbarth: Well, yes, but there are certain code words there, your Honor.

The Court: Very well.

The Witness: Well, we ask for an answer in response to our advising that we could book the grapes.

Q. (By Mr. Wackerbarth): Is there anything in that telegram about the confirmations? [201]

A. They were offered subject to confirmation.

Q. Now who would that refer to? When you say "offered subject to confirmation," who would that refer to?

The Court: That is what the word "ADLAM" means, A-D-L-A-M?

The Witness: Yes, sir.

The Court: In the trade?

The Witness: Yes, sir. That is a code word.

The Court: It means "offered subject to confirmation"?

The Witness: Offered subject to confirmation.

The Court: And the word "CORLU" means "wire immediately, must have answer by Thursday"?

The Witness: That is right.

Q. (By Mr. Wackerbarth): Now, among the trade, in a telegram of that character, Mr. Crane, who would that refer to as confirming the sale?

(Testimony of Raymond M. Crane.)

A. Well, in this particular instance it would refer to the party that sent the wire being able to confirm the terms of the wire sent.

Q. Then did that mean that it was to be confirmed by you or confirmed by the seller or confirmed by the buyer?

A. In this particular instance it would have to be confirmed by the seller. [202]

The Court: Our payment with confirmation, is that what that means?

The Witness: I beg your pardon?

The Court: It says: "Packed Twenty-Eight Pounds Net Display New Lugs Lidded Calripe or Comparable Brand \$500 Part Payment With Confirmation Price 2.53 Net to Shipper." That means they pay \$500 or you were to pay \$500? What does it mean?

The Witness: That means that the buyer is to pay \$500 with confirmation. In other words, it is customary in the trade on a transaction of this nature that the buyer upon acceptance of this offer would wire or transmit \$500 per car deposit.

The Court: And confirmation of the price of \$2.53 net?

The Witness: That is right.

Q. (By Mr. Wackerbarth): Did you ever get a confirmation signed by either the West Texas or the Central Fruit? A. No.

Q. Of any order? A. No. [203]

(Testimony of Raymond M. Crane.)

Q. Did you ever get a confirmation from Southwest Brokerage of a sale for the purpose of having it signed by the seller?

A. No, we never received a Standard Confirmation of Sale; no.

Q. Is there a difference between a Standard Memorandum of Sale and a Standard Confirmation of Sale among the produce trade? A. Yes, sir.

Q. What is the difference?

A. The difference is, a Standard Confirmation of Sale requires the signature of the buyer and the seller and the agent.

The Court: That is a printed form?

The Witness: A printed form, Standard Confirmation of Sale, approved by the U. S. Department of Agriculture and as under the Perishable Commodities Act.

The Court: Is it published some place in the Federal Register?

The Witness: I think it is. It is approved by the Department. [204]

* * *

Q. (By Mr. Wackerbarth): Mr. Crane, you have observed a Standard Memorandum of Sale which was sent to you in this case here?

A. Yes.

Q. Is that document that you observed there, the Standard Memorandum of Sale, is that different from the Standard Confirmation of Sale?

A. Yes, it is different.

(Testimony of Raymond M. Crane.)

Q. What is the purpose or object of the Standard Memorandum of Sale among the trade?

A. It is due to the fact that in many instances the seller requires a signed document and in some instances they don't require a signed document. I am talking about [205] nationally now.

Q. Yes, the practice. A. The practice.

The Court: You say you have one of those forms?

Mr. Wackerbarth: One is used here. It is an exhibit in this case, one of those standard confirmations, the one signed by Jay Margules.

The Witness: That is a standard memorandum.

The Court: That is a Standard Memorandum of Sale.

Mr. Wackerbarth: That is a Standard Memorandum of Sale.

The Court: I am looking for the confirmation.

Mr. Wackerbarth: We don't have one.

The Witness: There may be one in the Denunzio case filed there. I don't know whether it is a standard memorandum or confirmation.

Q. (By Mr. Wackerbarth): Mr. Crane, in the matter of the transactions between Southwest Brokerage, Kazanjian, West Texas and the Central Fruit, were you acting as an agent for any party?

A. Yes, sir. [206]

* * *

Q. Did you have any written authorization of agency in this case from either the Southwest Brokerage Company, the West Texas Produce Com-

(Testimony of Raymond M. Crane.)

pany, the Central Fruit & Vegetable Company, of form Kazanjian?

A. I had a telegram from Southwest Brokerage Company.

The Court: Which one is that?

Q. (By Mr. Wackerbarth): Designating you as an agent in this matter?

The Court: Which telegram is that?

Q. (By Mr. Wackerbarth): Which one are you referring to, Mr. Crane?

A. Well, that is the telegram that we received from Southwest confirming the deal.

The Court: Which telegram was that?

Q. (By Mr. Wackerbarth): Wasn't that a teletype conversation?

A. Either teletype or telegram. We considered them both the same.

Q. Do you find among your files here a telegram—I will hand you your file in that regard—do you find a telegram from Southwest Brokerage in which they confirmed or [207] created an agency, authorized an agency on your part?

A. (Examining file.)

The Court: To which telegram does he refer in his previous answer?

The Witness: In this teletype here where they offered to buy.

Q. (By Mr. Wackerbarth): Those are the teletypes that passed between you and Southwest Brokerage? A. Yes.

(Testimony of Raymond M. Crane.)

The Court: This will be marked for identification.

Mr. Wackerbarth: I think possibly we ought to let him read it in because it is very difficult to follow teletype messages.

The Court: He has handed me another one here. They can be read into the record. They will be marked Exhibits J and K.

Mr. Hayhurst: May they be read subject to any objection after we have heard what they are?

The Court: Very well.

(The telegrams referred to were marked Respondents' Exhibits J and K and received in evidence.) [208]

* * *

Q. (By Mr. Wackerbarth): Will you please read them? This was a teletype conversation which you had with Southwest Brokerage?

A. Yes. This is a teletype:

"Referring six cars Emperors Fort Worth and four Dallas, deal OK 2.50 net \$50 for you if legal. Presume it is legal or you wouldn't offer it. Advise. Go ahead."

That means for us to go ahead on the teletype. We replied:

"Haven't been able contact the shipper yet but sure it is OK. Will wire you definitely one way or other as soon as get him. Yes it is legal. Naturally a receiver can pay his whole markup for buying brokerage if he wants to. Will wire you soon as receive definite confirmation. Understand it is basis

(Testimony of Raymond M. Crane.)

\$1000 deposit against each U. S. 1 inspection as they are loaded."

Q. When did that teletype——

The Court: Then there is another one, "As far as I know that covers it." Is that it?

The Witness: It was on October 2nd.

The Court: Was there another one?

The Witness: It was followed up by a night letter or night message to Southwest Brokerage Company of Dallas [209] reading:

"Secured Red Lion Packing Company confirmation ten cars grapes as outlined you collect deposits to be forwarded to us soon as government inspection wired each car."

The Court: What does that mean, "as outlined you collect deposits"? You were to collect the deposits?

The Witness: No. It means that the Southwest Brokerage was to collect the deposits as outlined in the previous teletype message, namely, the basis of \$1000 deposit.

Mr. Hayhurst: We would object to the introduction of any conversation about having secured confirmation from Red Lion in the absence of any proof of the authorization in writing from Red Lion to the sender of that telegram or teletype to send such message. As far as Red Lion is concerned, it would be hearsay. It would be a conclusion of the sender.

The Court: I think it is, but I think it is admissible nevertheless. The objection is overruled.

(Testimony of Raymond M. Crane.)

Q. (By Mr. Wackerbarth): Did you have any teletype conversations with Southwest Brokerage or did you in any telegram waive the confirmation by both buyer and seller? A. No. [210]

* * *

Q. Was it your intention at that time, Mr. Crane, to have the purchaser sign a written confirmation of this sale? A. Yes, sir.

Q. Did you ever receive a written confirmation of this sale from the Southwest Brokerage?

A. No, sir.

Q. Did you ever receive a written confirmation of this sale from the West Texas Produce Company? [212] A. No, sir.

Q. Or from the Central Fruit? A. No, sir.

The Court: On a standard form or any other form?

The Witness: No signed confirmation; no.

Can I explain what we did receive, your Honor?

The Court: You received a memorandum?

The Witness: We received the Standard Memorandum of Sale.

Q. (By Mr. Wackerbarth): Now, Mr. Crane, among the produce trade is there such a relationship that is known as buying broker?

A. Yes, sir.

Q. What are the duties of a buying broker among the produce trade?

A. The duties of a buying broker is to contact shippers and procure and secure merchandise for buyers.

(Testimony of Raymond M. Crane.)

Q. Under those circumstances who pays the buying broker? A. The buyer.

Q. And is there any established practice of custom among the produce trade as to whose agent a buying broker is? Just answer that yes or no.

A. Yes.

Q. What is that practice or custom? [213]

A. In those respects he is the agent of the buyer.

Q. And in this particular instance were you acting as the agent of the buyer? A. Yes, sir.

Q. You are familiar with this telegram of October 3rd which you sent to Mr. Kazanjian?

A. Yes, sir.

Q. And you did receive the reply back that is a part of the findings of the Department of Agriculture, the telegram of October 4th?

A. Yes, sir.

Q. You received that back? A. Yes, sir.

Q. Prior to the sending of this telegram to Mr. Kazanjian, did you have a telephone conversation with him? A. Yes, sir.

Q. Did you confirm that telephone conversation by that telegram of October 3rd? A. Yes, sir.

Mr. Hayhurst: We object to that on the ground that it would call for a summary. This witness can testify to what he said or did.

The Court: Yes. Objection sustained.

Q. (By Mr. Wackerbarth): The telegram was sent after the conversation, that [214] is, the telegram of October 3rd? A. Yes, sir.

(Testimony of Raymond M. Crane.)

Cross-Examination

By Mr. Hoppenstein:

Q. Mr. Crane, earlier you testified, in answer to the questions propounded by your counsel concerning these War Food Administration quotations, that the price quoted was \$3 to \$3.25 per lug for U. S. No. 1 Emperor grapes. Will you please point out to me in these quotations the quotations that you testified about?

A. I didn't say that these—I said that I hadn't referred to these but that the market was \$3 to \$3.25.

Q. Are these the official quotations, Mr. Crane?

A. This is a quotation issued by the Federal-State Market News Service at San Francisco, California, outlining the local jobbing price in San Francisco which includes the jobber's markup and all of that. It is not the f.o.b. shipping point quotations on Emperor grapes or any other commodity that I can see.

Q. I will show you the one dated December 9, 1944, and ask you if it doesn't quote 28-pound lugs from cold storage Emperors \$4.25 to \$4.50, a few Almerias \$4.50.

A. This is the San Francisco jobber's price to the retail store. This is not the carload price that we are talking [215] about.

Q. Are all these quotations qualified by that?

A. I wouldn't say that. I haven't looked at all of them.

(Testimony of Raymond M. Crane.)

Q. Will you look at the one of December 11, 1944? A. (Examining exhibit.)

Q. In your previous testimony, that testimony was not based on these reports? A. No.

Q. All right. You didn't find those quotations in there then? A. No.

Q. Mr. Crane, it is true, is it not, that you wired Mr. Teel, a broker in Fort Worth, on or about December 11, 1944, that the market price for Emperors was \$4 per lug? A. No, I didn't.

Q. Would you produce your office copy of this in accordance with the notice to produce?

Mr. Wackerbarth: We don't have any. [216]

* * *

Q. (By Mr. Hoppenstein): I show you this copy of a telegram which is marked complainants' exhibit——

The Clerk: No. 6.

(The copy of the telegram referred to was marked Complainants' Exhibit No. 6 for identification.)

Q. (By Mr. Hoppenstein): ——Complainants' Exhibit 6, and ask you whether or not that is a true copy of a telegram you sent to Jimmie Teel in Fort Worth?

A. (Examining exhibit): This is a copy of a wire that [217] was sent by Associated Fruit Distributors of California to Jimmie Teel of Fort Worth, December 11, 1944, which reads:

“Referring to Our Circular of the Ninth Not

(Testimony of Raymond M. Crane.)

Sure but Think Owner Willing Confirm 4.00 Emperors Subject Immediate Reply.”

Q. So that was the prevailing price in Los Angeles on December 11, 1944?

A. No, wait a minute. This does not show the kind nor quality, unless it is tied in with the rest of it. That might be Extra Fancy, Super Duper—I don’t know what it is without refreshing my memory.

Q. Your circular of December 9th refers to U. S. 1 Emperor grapes, does it not, Mr. Crane?

A. Yes, sir.

Q. And you are quoting their \$4.15 f.o.b.?

A. That is on U. S. No. 1s out of storage.

Q. Isn’t it true that Mr. Teel in Fort Worth attempted to get confirmation from you for grapes of U. S. No. 1 quality?

A. I don’t recall that he did.

Q. What was the occasion for you sending that telegram quoting that price?

A. It might have been an effort to solicit business. I don’t know.

Mr. Hoppenstein: We offer Exhibit No. 6 in evidence. [218]

The Court: Admitted as No. 6.

(The telegram previously marked Complainants’ Exhibit No. 6 for identification was received in evidence.)

Q. (By Mr. Hoppenstein): Mr. Crane, it is true, is it not, that U. S. No. 1 Emperor grapes were

(Testimony of Raymond M. Crane.)

scarce in October, November and December of 1944?

A. No, they weren't scarce.

Q. It is true, is it not, that there was a great demand for U. S. No. 1 Emperor grapes?

The Court: In those months?

The Witness: The demand was off and on. Demand is not continuous.

Q. (By Mr. Hoppenstein): During the months of October, November and December, 1944, wasn't the demand so great that buyers were willing to pay a procurement charge for them?

A. No, that isn't true. The only time the buyers were willing to pay a procurement charge was during the ceiling.

Q. After the ceiling was lifted, did you handle all of Mr. Kazanjian's grapes?

A. I don't think so. [219]

* * *

Q. Did you handle all his grapes?

A. I think we handled a few.

Q. How many?

A. I don't recall exactly.

* * *

Q. Did you handle the cars concerning which Mr. Kazanjian testified about with reference to the summary of the sales that he made, were those sales made by you?

A. Well, I can't remember. If they are on his record I would be able to take that record that we handled them. [220]

(Testimony of Raymond M. Crane.)

Mr. Hoppenstein: Do you have that exhibit?

The Court: Exhibit G-1.

Mr. Wackerbarth: Give him Exhibits G and G-1.

(The exhibits referred to were passed to counsel.)

Q. (By Mr. Hoppenstein): Exhibit G-1, is that the summary of your sales for Mr. Kazanjian?

A. I wouldn't be able to testify to that. Mr. Kazanjian could testify whether they were. I couldn't remember whether they were or not.

Q. You received a commission and brokerage on the sale of the grapes that you handled for Mr. Kazanjian, didn't you?

A. Well, I would have to assume that we did. I couldn't remember unless I actually looked at the record whether we received a commission on those specific cars or not.

Q. On any of the cars that you handled for Mr. Kazanjian?

A. Yes, on some of the cars we did receive a commission.

Q. Mr. Crane, when you wired Southwest Brokerage on October 2, 1944, at 5:25 p.m., "Secured Red Lion Packing Company confirmation ten cars grapes as outlined you collect deposits to be forwarded to us soon dupja wired each car," you recall that telegram?

A. Yes, sir. [221]

* * *

Q. You signed that?

A. Yes, sir.

* * *

(Testimony of Raymond M. Crane.)

Q. What statement or authority or conversation had you secured from Mr. Kazanjian, Red Lion, as a basis of sending that wire?

A. Well, Mr. Kazanjian stated that if we could meet the terms demanded he would be—— [222]

* * *

Q. Will you answer, Mr. Crane?

A. That he would sell these grapes under the terms that we had outlined in our telegrams and previous communications.

Q. Did you outline to Mr. Kazanjian the terms under which you offered these grapes and had received an offer back from Southwest Brokerage Company? A. Yes, sir.

The Court: On the telephone?

The Witness: Yes.

The Court: What did you say to him?

The Witness: I told him that this man, that we wanted to buy these grapes for this man at the price of \$2.50 and \$1000 a car deposit.

The Court: For 15 cars.

The Witness: For 10 cars. On this particular transaction there was 10 cars and I think there was 5 still open.

The Court: But it was all 15 cars?

The Witness: We were working on 15 at the time. I think we sold the other 5 at the time to Denunzio. There were 15 cars in the [223] transaction.

The Court: Did you tell Mr. Kazanjian that these were to be new display lidded lugs?

(Testimony of Raymond M. Crane.)

The Witness: I don't think we specifically mentioned that they were to be new display lidded lugs.

The Court: To him?

The Witness: I don't think we specifically mentioned it at that particular time; no.

Q. (By Mr. Hoppenstein): Had you mentioned it at a prior time?

A. No. I still would understand that they would be display lugs because practically a hundred per cent of the shippers always use display lugs.

Q. Was Mr. Kazanjian using new display lugs?

A. I didn't know. I was assuming that he was using them.

Q. When you sent your telegram of September 26, 1944, you specified packed 28-pound net display new lugs lidded Calripe or comparable brand, did you not?

A. Yes, sir.

Q. At that time did you know that Mr. Kazanjian had that type of grape?

The Court: Had that type? You mean that Calripe or comparable brand?

Mr. Hoppenstein: That is right, the Calripe brand.

The Witness: Yes, I did. [224]

Q. (By Mr. Hoppenstein): Was that his brand?

A. Yes.

Q. Did you know he had the display new lugs?

A. I thought that he had. Every shipper uses display lugs. If he didn't use it, it is news to me right now.

The Court: You never discussed it with him?

(Testimony of Raymond M. Crane.)

The Witness: No.

The Court: Did you tell Mr. Kazanjian that he was to pay all storage charges?

The Witness: We talked about the storage charges and the deal was to be made and the buyer put up the deposit on the grapes. We were to procure the storage. I can't recall specifically what we said about paying the storage.

The Court: Who was going to pay the storage?

The Witness: On the basis of the transaction.

The Court: You did advise the people who received this telegram of September 26th that the shipper would pay all the storage?

The Witness: Well, under that, if I did why we discussed it because I would have to look at the record to be sure how we did arrive at that, but I know we arranged the storage.

Q. (By Mr. Hoppenstein): Mr. Crane, at the time you sent the telegram of September 26th, 1944, the first time to the 13 brokers, firms, outlining the proposal to book these cars of grapes, had you [225] discussed the terms under which you offered those grapes with Kazanjian? A. Yes, sir.

* * *

Q. Prior to your sending the telegram of September 26, 1944, outlining the terms and quoting originally a price of \$2.53 with a \$500 part payment, prior to your sending that telegram had you discussed those terms with Mr. Kazanjian?

A. Yes, I discussed them. Mr. Kazanjian said

(Testimony of Raymond M. Crane.)

if I had any business at that price that he would think about confirming it. [226]

Q. Did you subsequently, on October 2nd, send out wires to the various brokerage firms, including Southwest Brokerage Company, revising your quotation, reducing the price from \$2.53 to \$2.50?

The Court: There is a telegram of October 2nd, reading:

“CPFGP Quoting Futures Emperors Secured Revised Deal 15 Cars U. S. 1 2.50 Net Same Deal Corsd Any Part.”

Q. (By Mr. Hoppenstein): Did you sign that telegram and send it? A. Yes, sir.

Q. At the time you sent that telegram, had you discussed the terms of it with Mr. Kazanjian?

A. Yes, sir.

* * *

Q. What if anything did Mr. Kazanjian say to you concerning the terms outlined in your revised wire?

* * *

The Witness: That is right. It was all offered subject to confirmation. [227]

Q. (By Mr. Hoppenstein): Did he agree to that?

A. Yes. He didn't agree to it because it is subject to confirmation. In other words, you don't make a deal until you get a confirmation, until it is finished.

* * *

(Testimony of Raymond M. Crane.)

The Court: In your wire of October 2nd you refer to, "Haven't been able contact the shipper yet but sure it is OK. Will wire you definitely one way or other soon as get him. Yes it is legal. Naturally a receiver can pay his whole markup for buying brokerage if he wants to. Will wire you soon as receive definite confirmation." You used the term there, and you also used it in the wire to Kazanjian on October 3rd, "confirmation for your signature." And also in your wire of September 26th, the word "ADLAM" I understand means "offer subject to confirmation."

Now in the trade is that term "confirmation" understood to mean the standard form of Standard Confirmation of Sale?

The Witness: Well, not necessarily. The produce business and the perishable business by its nature requires that anyone doing business be very careful in their telegrams to state "subject to confirmation" because in sending a telegram, and you offer a firm book, you would be liable for delivery [228] and in all terms, and if you will look at the bottom of our bulletin it says, "all quotations are subject to confirmation," and the produce business being different than most businesses——

The Court: That is, confirmation in writing?

The Witness: That is right.

The Court: That is what is generally understood?

The Witness: That is generally what is understood.

(Testimony of Raymond M. Crane.)

The Court: By the person who is actually going to pay it?

The Witness: Yes. Telegrams in our business, however, are considered writing.

The Court: By a person who is going to pay for it?

The Witness: That is right.

The Court: By a broker?

The Witness: Not necessarily by a broker. If it is a requirement by the broker that they secure a written confirmation. There is rulings on that in the PACA.

The Court: What I am getting at here is the custom of the trade, in other words, the procedure. You would deal with somebody selling cherries or something else, with a broker, and you would make an offer to him and he would accept it, and then you are subject to confirmation?

The Witness: That is right.

The Court: Then he would have to secure a confirmation [229] from the person he was going to sell it to?

The Witness: That is right.

The Court: In writing?

The Witness: That is right.

The Court: And give it to you?

The Witness: That is right.

The Court: And you would have to secure it from the person you were going to buy it from and give it to him?

The Witness: That is right.

(Testimony of Raymond M. Crane.)

The Court: Is that what the term is generally understood to mean in the trade?

The Witness: It is generally understood to mean that.

The Court: And was it generally understood to mean that in October, 1944?

The Witness: Yes. The only difference, if I might clarify that, is that a memorandum of sale is usually used when a car is on track, like in Dallas, Texas, and they go down to a buyer and they agree at a price of \$2.50, etc., then they use the memorandum of sale and one is sent to the buyer.

The Court: In other words, the goods are there and it is a sale?

The Witness: That is right. But where it is a pre-season deal——

The Court: Or future delivery? [230]

The Witness: Or future delivery, the Standard Confirmation of Sale is always required, according to my experience.

The Court: In other words, in shipping oranges they would ship them en route to Kansas City and you would wire a broker that they were going to be there and the broker there would make the sale, he would make a memorandum of sale and deliver the oranges?

The Witness: He would get the money and that is all there would be to it.

The Court: He would get the money, you would get the oranges and he would get the memorandum?

The Witness: That is right.

(Testimony of Raymond M. Crane.)

The Court: But if you were selling oranges or cherries or potatoes or grapes today for futures, in the custom of the trade it is customary to get a confirmation of sale signed by the parties on both ends who are actually paying the money or delivering the goods?

The Witness: Yes, sir.

The Court: Very well.

Q. (By Mr. Hoppenstein): Isn't it true, Mr. Crane, that it is customary in the trade, and was customary in October, 1944, to accept telegrams as confirmation of sale?

A. Yes, except where they were required to secure a [231] signed confirmation. [232]

* * *

Q. (By Mr. Hoppenstein): Mr. Crane, in connection with this transaction involving the Southwest Brokerage Company, Central Fruit & Vegetable and West Texas Produce Company, directing your attention to the transaction involving the 10 cars of grapes, please state whether or not it was a custom of the trade in that type of transaction to secure a signed written confirmation from the shipper, such as Red Lion. [233]

* * *

The Witness: Yes.

Q. (By Mr. Hoppenstein): Mr. Crane, when you sent your telegram——

The Court: While you are on that subject, was

(Testimony of Raymond M. Crane.)

it the custom in the trade in the situation such as existed here in the interchange of telegrams, for you to secure a written confirmation of the sale from the principals who were the buyers, namely, the West Texas and the Central Fruit & Vegetable?

The Witness: Yes, sir.

The Court: And you did not ever get that?

The Witness: I never did receive it.

Q. (By Mr. Hoppenstein): Mr. Crane, when you wired Southwest Brokerage Company on October 2, 1944, at 5:25 p.m., "Secured Red Lion Packing Company confirmation," state whether or not you had Red Lion's signature on a confirmation.

A. I didn't. I had their verbal agreement over the telephone, as I stated here.

Q. Did you consider that a confirmation in accordance with the usage of the trade at that [234] time?

* * *

The Witness: The custom of the trade is, you get a deal, you call a shipper, you buy or sell or whatever you are doing, and if they agree to what you have done they say yes or no. In this particular instance I thought that I secured entire agreement as to what we proposed and what we had been proposing.

The Court: But you had not secured a confirmation in the sense that you have been using the word in response to my questions?

The Witness: Confirmation of sale and signature, that is a different subject.

(Testimony of Raymond M. Crane.)

Q. (By Mr. Hoppenstein): You hadn't received that written confirmation of sale, had you?

A. No.

Q. But you did wire Southwest Brokerage Company that you secured confirmation, didn't you?

A. Of the deal, because the Southwest Brokerage Company was to get a confirmation signed by the buyer and send it to us and we would get it signed by the shipper and send one copy back and retain one copy.

Q. You intended for Southwest Brokerage Company and West Texas Produce Company and Central Fruit & Vegetable Company to rely upon your telegram of October 2nd, did you not? [235]

* * *

The Witness: Yes.

* * *

Q. You received from Southwest Brokerage Company, did you not, Mr. Crane, a Standard Memorandum of Sale agreement dated October 3, 1944?

A. Yes, sir.

Q. Signed by Jay Margules? A. Yes, sir.

Q. Did you not? A. Yes, sir. [236]

* * *

Q. You received it, did you not, right after October 3, 1944?

A. Well, I don't know when I received it. I can't remember that far back. It may be sometimes a week, and sometimes they don't send them for two weeks.

(Testimony of Raymond M. Crane.)

Q. When you received it did you make any objection to it? A. No, sir. [237]

* * *

The Witness: I will tell you, to be perfectly frank with you, I very seldom look at those confirmations. They come into the office and they go into the file, and we rely mostly on our wire transactions. We get a wire transaction complete and the whole business goes into a jack, and we usually look at the price, or the girl looks at the price, and sees that it is the same as is on the jacket, but in this particular instance the ceiling went off and we just sort of dropped it.

Q. (By Mr. Hoppenstein): Mr. Crane, at the time the ceiling went off, did you receive a wire from Southwest Brokerage Company requesting whether or not the cars of grapes could be delivered and shipped prior to December? [238]

* * *

The Court: Is that wire here?

Mr. Hoppenstein: Yes, the wire is in evidence, or teletype I believe.

Q. You had a conversation with Mr. Margules concerning it, didn't you?

A. The record I think will speak for itself.

Q. Did you then contact Mr. Kazanjian to ascertain whether or not the grapes would be delivered?

(Testimony of Raymond M. Crane.)

A. Yes, sir.

Q. What did Mr. Kazanjian tell you?

A. Mr. Kazanjian told me that inasmuch as the ceiling was off that he didn't feel that we had a contract, he didn't feel that he had committed himself to anything and he wouldn't deliver the grapes.

Q. You sent a letter to Southwest—I mean a telegram to Southwest Brokerage Company—stating that Red Lion considered account ceiling lifted any contracts Emperors voided, didn't you?

A. That is right.

* * *

Q. I will ask you whether or not Mr. Kazanjian told you [239] that he didn't consider the contract with Central Fruit and West Texas Produce valid because the ceiling had been lifted?

A. I don't recall as to that. He wouldn't deliver the grapes. [240]

* * *

July 13, 1950—10:00 A.M.

RAYMOND M. CRANE,

the witness on the stand at the time of adjournment, resumed the stand and testified further as follows:

Cross-Examination
(Continued)

By Mr. Hoppenstein:

* * *

Q. Mr. Crane, did you have occasion to inspect

(Testimony of Raymond M. Crane.)

Mr. Kazanjian's grapes that were involved in the transaction that you had with Mr. Margules?

A. Not these specific grapes; no.

Q. You never did inspect them?

A. I don't know that I would be able to identify them as connected with these specific lots.

* * *

Q. You had men in your office working for you at that [250] time, didn't you? A. Yes.

The Court: Do you know what Mr. Kazanjian's total crop was that year in carloads, or what it had been the previous years?

The Witness: Well, it varies from year to year because his total crop itself—he owns so many vineyards one year, sells some, has more the next year, and buys some.

The Court: Forty or 50 cars a year?

The Witness: Roughly 50 to 75.

The Court: Fifty to 75 cars a year?

The Witness: Yes.

Q. (By Mr. Hoppenstein): In addition to his own crops, does he buy and sell other crops?

A. At times.

Q. Was he doing it in '44?

A. I don't recall specifically.

Q. On October 12th, Mr. Crane, did you send this wire to Southwest Brokerage Company, a copy of which I am showing you?

* * *

(Testimony of Raymond M. Crane.)

The Witness (Examining telegram): Yes. [251]

* * *

The Court: The witness testified he sent the wire?

The Witness: Yes, sir.

May I qualify that, your Honor?

The Court: Yes.

The Witness: In my opinion that doesn't necessarily mean that those are the same grapes that were originally tendered in the original contract.

The Court: I understand. In other words, you cannot identify one gallon of water in a 5-gallon can.

The Witness: Correct.

The Court: Proceed.

Q. (By Mr. Hoppenstein): Mr. Crane, your deposition was taken on April 28, 1950, was it not, by Mr. Pines in Los Angeles?

A. I think that is a matter of record.

Q. Well, you testified in answer to questions propounded to you before a court reporter, did you not? [253]

A. Yes.

Q. I will ask you whether or not you didn't testify, in response to a question propounded to you by Mr. Pines, as follows:

"Q. I will ask you, Mr. Crane, whether or not you had a long distance telephone conversation with Mr. Kazanjian before you sent that wire"?

Mr. Hayhurst: May I have the page?

Mr. Hoppenstein: Yes. It is page 11, line 12.

(Testimony of Raymond M. Crane.)

Q. And you answered:

“A. Yes, sir.”

Didn't you so testify? [254]

* * *

The Court: I have the testimony here. I have read it. And the witness stated that he so answered.

Q. (By Mr. Hoppenstein): Mr. Crane, didn't you testify on April 28th:

“A. Mr. Kazanjian confirmed to us, as agents for the buyer, the carloads of grapes in question under the terms and on the basis of the telegrams that we have mentioned here that were sent back and forth and was later confirmed by Mr. Kazanjian's wire to us as of the next day, as I recall.”

You so testified, didn't you?

A. That is too long.

The Court: Show him the testimony. Here is the deposition. [255]

The Witness: (Examining deposition.)

Q. (By Mr. Hoppenstein): Page 11, line 18. Is that your testimony? A. That is right.

Q. And on page 12 of that deposition, line 4, the question was:

“Q. In this conversation did you relate to him the terms that had been agreed upon with Southwest Brokerage Company with respect to the sale of this carload of grapes?”

(Testimony of Raymond M. Crane.)

And your answer was:

“A. Yes, sir.”

Is that right? A. That is right.

Q. Continuing:

“Q. Or I should say 10 carloads of grapes, and Mr. Kazanjian at that time told you that it was a deal and you could go ahead and confirm it”?

And you answered:

“A. That is right.”

Did he so tell you? A. That is right.

Q. Line 12:

“Q. I refer you to a telegram, Mr. Crane, from you to Mr. Kazanjian, dated October 2, 1944, [256] which starts out as follows:

“ ‘Referring telephone have sold for your account basis 2.50 lug net to you block Emperors mentioned * * *’

“A. That is right.”

You so testified? A. Yes.

Q. Line 18:

“Q. That conversation referred to in that telegram is the telephone conversation you have just testified concerning?

“A. Yes, sir.”

Is that right? A. That is right.

Q. Next question:

“Q. The terms mentioned in this telegram

(Testimony of Raymond M. Crane.)

are the terms discussed between you and Mr. Kazanjian in that telephone conversation that preceded the sending of that telegram?

“A. Yes, sir.”

Is that right? A. That is right.

Q. Next question:

“Q. Did you receive a reply from Mr. Kazanjian? [257]

“A. Yes, sir.”

You so testified? A. Yes, sir.

Q. Next question:

“Q. Do you have that before you?

“A. Yes, sir.

“Q. That is the telegram that reads as follows:

“ ‘Fifteen cars storage U. S. 1 Emperors December 10th conversation satisfactory at two dollars and fifty cents f.o.b. Exeter guaranteed by buyer one thousand dollars deposit on ten cars and seven hundred fifty dollars on five cars said deposit to be paid immediately on inspection at shipping point you to arrange for storage as agreed balance of pack intend to load after October 20th will be glad to make deal on same about 15th of October.’

“Is that the telegram you received from Mr. Kazanjian? A. Yes, sir.”

Is that your testimony? A. Yes.

(Testimony of Raymond M. Crane.)

Q. Now, Mr. Crane, getting off a minute from the deposition, after you received the wire from Mr. Kazanjian dated October 4th, did you then communicate to Southwest Brokerage, Mr. Margules or these complainants here, that there was any [258] change in the offer?

A. I communicated with them as borne out by the record here in relation to our telegrams which we have sent.

Mr. Hoppenstein: If your Honor please, I think we are entitled——

The Witness: I can't remember exactly what I said unless I refer to the wires and whatever I sent in the wires that is what I confirmed. [259]

* * *

Q. (By Mr. Hoppenstein): After October 4th and prior to October 10th, did you send any wire to Associated advising that your telegram of confirmation was erroneous?

Mr. Hayhurst: We would object to that on the ground that it calls for a conclusion and opinion of the witness.

The Court: Let me hear the question.

(The question referred to was read by the reporter as follows:

("Q. After October 4th and prior to October 10th, did you send any wire to Associated advising that your telegram of confirmation was erroneous?")

(Testimony of Raymond M. Crane.)

The Court: To Associated?

Mr. Hoppenstein: To Southwest.

Mr. Wackerbarth: We object to that as calling for a conclusion of the witness.

The Court: It is a little complex and compound. I do not understand it.

Q. (By Mr. Hoppenstein): After you received the wire from Mr. Kazanjian of October 4th, please state whether or not you sent any wire to Southwest Brokerage advising them of the receipt of Kazanjian's wire. A. I don't remember. [260]

* * *

Q. As a matter of fact, you didn't, did you, Mr. Crane?

A. I don't remember. I don't see it here.

Q. Now, going back to the deposition on page 13, line 16:

"Q. Was there anything in that telegram that indicated to you that Mr. Kazanjian was quoting terms different from or other than those terms which he had authorized you to confirm to the Southwest Brokerage Company?

"A. They are the same terms that we offered to the Southwest Brokerage Company."

That is correct, isn't it?

A. Well, as I recall——

Mr. Hayhurst: Just a minute.

Q. (By Mr. Hoppenstein): That is your testimony. [261]

* * *

(Testimony of Raymond M. Crane.)

The Court: Well, he so testified.

Q. (By Mr. Hoppenstein): That was your testimony on April 28th, wasn't it, Mr. Crane?

A. Yes, sir.

Q. And the next question:

"Q. Shortly thereafter the Southwest Brokerage Company sent you a Standard Memorandum of Sale on this transaction, is that right?

"A. Yes, sir."

You so testified?

A. Yes.

Q. On page 14, line 2:

"Q. Do you recall receiving the Standard Memorandum of Sale?

"A. I don't recall specifically receiving it, but here is a photostatic copy of it or what purports to be a photostatic copy of it.

"Q. What did you do with that Standard Memorandum of Sale when you received it?

"A. I think we probably filed it.

"Q. Was there anything in that Memorandum of Sale containing the terms different from or other than those terms of sale which had been confirmed in the telegraphic correspondence that we have [262] mentioned previously?

"A. In substance, the confirmation is the same. There are a few small differences, but in substance I would say the confirmation is the same.

"Q. Was there anything about the Standard

(Testimony of Raymond M. Crane.)

Memorandum of Sale that would cause you or that did cause you to cause any correction to be made in it?

“A. Well, I don’t recall specifically right at the moment without checking back on those telegrams.

“Q. Did you communicate with the Southwest Brokerage Company in any manner or form for any correction as to the Standard Memorandum of Sale?

“A. I don’t specifically recall right offhand at the moment.”

That is what you testified to on the 28th of April?

A. Yes.

Q. Now, Mr. Crane, have you inspected your records and checked your telegrams to see if you did send any telegrams correcting the Standard Memorandum of Sale agreement?

A. No, we didn’t send any telegrams correcting any Standard Memorandum of Sale. We didn’t consider it a contract.

Q. You didn’t consider it a contract?

A. We requested a signed confirmation on the transaction. [263]

Q. Yes? A. We never received it.

Q. Did you receive confirmation from Kazanjian?

A. We had a telegram from Kazanjian; yes.

Q. You did represent as a broker, did you not, Mr. Crane, that you had secured confirmation?

(Testimony of Raymond M. Crane.)

Mr. Wackerbarth: That is objected to as calling for a conclusion of the witness. He didn't say that at all.

Mr. Hoppenstein: His telegram stated that.

The Court: Objection sustained.

Q. (By Mr. Hoppenstein): You did send a telegram stating that you had secured confirmation?

A. Yes, sir.

Q. Did you secure confirmation?

Mr. Hayhurst: Same objection.

The Court: It all depends on what you mean by "confirmation," counsel. The question is not clear, did you secure confirmation. It looks to me like that is what I have to decide.

Mr. Hoppenstein: As described in the telegram to Southwest Brokerage Company.

Mr. Wackerbarth: We object to that now as calling for a conclusion of the witness.

The Court: Objection sustained. [264]

Q. (By Mr. Hoppenstein): Were the facts as stated in the telegram of October 2nd, or the telegram to Southwest Brokerage commencing "Secured confirmation," were the facts therein stated true, Mr. Crane?

Mr. Wackerbarth: That is objected to as calling for a conclusion of the witness.

The Court: Objection sustained. The witness has testified repeatedly, and I have read his deposition, and every one of these that I pick up I read the same questions and answers. He sent the telegrams,

(Testimony of Raymond M. Crane.)

he got nothing in writing other than that he has had telephone conversations, and that is that.

Q. (By Mr. Hoppenstein): Did you request a written confirmation from Southwest?

A. As I recall, that was part of the original terms of the transaction.

Q. After you got the standard form, the Standard Memorandum of Sale agreement?

A. No, not after that. It wasn't what I wanted.

Q. Did you advise them that it wasn't?

A. No, I didn't because the ceiling went off and that was all there was to it. I dropped the deal when the ceiling went off because I talked to Mr. Kazanjian and I couldn't get [265] confirmation. He wouldn't deliver, so there was nothing I could do, and so I advised them.

Q. Mr. Crane, you did try to get Kazanjian to make a try? A. Sure I did.

Q. And Mr. Kazanjian took the view that because the ceiling was lifted that is why he didn't have a contract, isn't that correct?

Mr. Hayhurst: We object to that as calling for a conclusion and opinion of the witness.

The Court: Objection sustained. You can ask him about any conversations he had with Kazanjian.

Q. (By Mr. Hoppenstein): Didn't you have a conversation with Mr. Kazanjian asking him to make delivery? A. Yes, sir.

Q. Did Mr. Kazanjian then tell you because the ceiling was lifted he was not morally obligated to deliver?

(Testimony of Raymond M. Crane.)

Q. Didn't he tell you that?

A. Well, he told me that he felt that way and he wasn't going to deliver.

Q. Mr. Crane, your deposition was also taken on September [266] 10, 1946, wasn't it?

A. If that is what the record says, it was.

* * *

Q. I show you page 9 of your deposition, line 16, through page 10, through line 10 on page 10. Didn't you so testify?

A. (Examining deposition.)

The Court: That is the deposition of September 10, 1946?

Mr. Hoppenstein: Yes, sir.

The Witness: That is correct.

Q. (By Mr. Hoppenstein): At that time you testified that \$4 was the market price.

A. That is December 10th or 11th.

Q. 1944? A. That is right.

Q. That was the market price for U. S. No. 1 Emperor grapes, wasn't it? [267]

* * *

Q. So that your testimony yesterday of \$3.25 was incorrect?

A. The record will reveal that I testified yesterday that the prices that I testified to yesterday were between the period of October 9th through November.

Q. And from November on the prices did go up then?

(Testimony of Raymond M. Crane.)

A. It went up very sharply in December or about that time.

* * *

Redirect Examination

By Mr. Wackerbarth:

Q. The price that you are referring to, Mr. Crane, of \$4 or \$4.15, was that for U. S. 1 grapes?

A. Yes, sir, that was U. S. No. 1 grapes out of storage.

Q. And that is U. S. 1 out of storage?

A. Yes, sir.

Q. And that doesn't refer to U. S. 1 in storage as of October? A. No.

Q. Is that correct? A. Correct. [268]

Q. Now, Mr. Crane, you have heretofore testified with reference to the practice adopted by the trade in the use of Standard Memorandums of Sale and Standard Confirmations of Sale? A. Yes, sir.

Q. Have you produced in court here a set of Standard Confirmations of Sale?

A. Yes, sir. [269]

* * *

Q. I show you here Exhibit L, which is a document denominated Standard Confirmation of Sale, and it consists of three pages, a white page, a pink page and a yellow page. A. That is right.

Q. Is that the customary Standard Confirmation of Sale used by the produce trade, or was it the form used by the produce trade in 1944?

(Testimony of Raymond M. Crane.)

A. Yes, sir.

The Court: Throughout the country? [270]

The Witness: Yes, sir.

Q. (By Mr. Wackerbarth): Throughout the whole United States? A. Yes, sir.

Mr. Wackerbarth: Now, this is offered in evidence, your Honor.

The Court: Admitted.

(The document previously marked Respondents' Exhibit L for identification was received in evidence.)

Q. (By Mr. Wackerbarth): Mr. Crane, I want to direct your attention to this document here. Can you read for the benefit of the record the small type at the top there? A. Yes, sir.

"The broker or salesman on receiving notice of the seller's acceptance of the buyer's order shall fill out this Standard Confirmation of Sale in triplicate and present all three copies to the buyer for authentication by his signature. The broker or salesman shall also sign the three Copies on behalf of the seller and shall deliver one copy to the buyer and one to the seller and shall retain the third for his file. This Standard Confirmation of Sale as authenticated by the buyer and broker or salesman shall constitute the complete contract of sale and [271] neither party shall have the right to rely on oral representations or promises of the other. All modifications must be in writing and authen-

(Testimony of Raymond M. Crane.)

ticated in the manner provided above for this Standard Confirmation of Sale to which such modification shall refer. Unless the seller makes immediate objection upon receipt of his copy of this Standard Confirmation of Sale, showing sale was made contrary to authority given the broker or salesman, he shall be conclusively presumed to agree that the terms of sale as set forth herein are fully and correctly stated."

Q. Now, Mr. Crane, when you sent the original telegram to Southwest Brokerage of September 26th, and when you sent the amended telegram of October 2nd presenting this offer to procure grapes and in which you used the words "subject to confirmation," were you in that telegram referring to a confirmation by the use of a Standard Confirmation of Sale as known to the trade?

Mr. Hoppenstein: Just a minute. We object to that on the ground that it would be attempting to vary the terms of his own written instrument, and would be an attempt to invade the mental processes of Mr. Crane.

The Court: Objection overruled.

Mr. Hoppenstein: His intention not having been conveyed to the complainants—— [272]

The Court: This testimony goes to the custom of the trade. In other words, whether it was his intention to vary the custom of the trade or to follow the custom of the trade.

You may answer the question.

(Testimony of Raymond M. Crane.)

The Witness: Will you repeat the question?

* * *

The Witness: Yes, sir.

The Court: Had you used this form previously with Mr. Kazanjian?

The Witness: I don't recall that we had used that form specifically, no, except that we have used that form for years on all pre-season deals where it required a contract in writing.

Q. (By Mr. Wackerbarth): Now, for the benefit of the record, Mr. Crane, I want to show you a Standard Memorandum of Sale that has the printing [273] on the reverse side.

The Clerk: That will be Exhibit M.

(The document referred to was marked Respondents' Exhibit M for identification.)

Q. (By Mr. Wackerbarth): I show you Exhibit M, Mr. Crane, and ask you if that is the form of Standard Memorandum of Sale used in the produce industry during the year 1944?

Mr. Pines: We will stipulate that it is.

The Court: And that it was generally used throughout the country?

The Witness: Yes.

Mr. Pines: Yes.

Mr. Wackerbarth: We will offer it in evidence.

The Court: Admitted.

(Testimony of Raymond M. Crane.)

(The document previously marked Respondents' Exhibit M for identification was received in evidence.)

* * *

Q. Was it a custom in the produce trade in 1944, Mr. Crane, to use both the Standard Confirmation of Sale and the Standard Memorandum of Sale?

A. Yes. [274]

Q. Yesterday you testified as to the different circumstances under which they were used.

A. Yes, sir.

The Court: Is it stipulated that the one that was used here, the memorandum of sale, had all this same printing on the back?

Mr. Hoppenstein: Yes, your Honor. It is a standard form. [275]

* * *

Q. (By Mr. Wackerbarth): Mr. Crane, did you at any time ever receive a Standard Confirmation of Sale on the form Exhibit L signed by the West Texas Produce Company or the Central Fruit & Vegetable Company?

The Court: Or Southwest?

Mr. Wackerbarth: Or Southwest.

The Witness: No.

The Court: Or Red Lion?

The Witness: No. [276]

* * *

Q. (By Mr. Wackerbarth): I show you, Mr. Crane, the telegram to Jimmie Teel at Fort Worth, which is a part of the record in this original pro-

(Testimony of Raymond M. Crane.)

ceeding, dated December 11th. Now were you referring, Mr. [277] Crane, to U. S. 1 grapes out of storage as of that date? A. Yes.

Q. You were asked if you were paid a commission by Mr. Kazanjian in connection with the sale of grapes during the year 1944. Did you sell any grapes for Mr. Kazanjian after the ceiling went off on October 9, 1944? A. Yes.

Q. Prior to that time and during the portion of the year up to the time the ceiling went off, did you sell any grapes for Mr. Kazanjian? A. No.

Q. Did you sell grapes for any of the packing-houses during the time that the ceiling was on grapes, during the year 1944?

A. Without looking at the records specifically, I couldn't recall, couldn't make a positive statement, but I think that we did in some instance earlier in the season during the grape deal. Of course that particular year the ceiling was on, then it went off, then it came back on again.

Q. During the period of time that the ceiling was on, did you sell grapes for any packing house for a commission?

* * *

The Witness: I don't recall. [278]

Q. (By Mr. Wackerbarth): Did you have any agreement of any character with Mr. Kazanjian for the payment to you of a commission in connection with the sale during the period of 1944 when the ceiling was on? A. No, I did not.

* * *

(Testimony of Raymond M. Crane.)

Recross-Examination

By Mr. Hayhurst:

Q. The only written document that you ever received from Red Lion or John Kazanjian was the telegram of October 4, 1944, isn't that correct, Mr. Crane? A. Yes, sir.

Q. That is, pertaining to this transaction?

A. Yes, sir.

Q. You had no authorization from either Kazanjian or Central Fruit & Vegetable Company or West Texas Produce Company or Southwest Brokerage Company authorizing you to sell or buy grapes for them, did you, in the season 1944?

A. I think the record would speak for itself.

The Court: Other than those wires? [279]

The Witness: No, nothing other than that.

Q. (By Mr. Hayhurst): Other than the written documents that are in evidence here, you had no authorization in writing from any of those parties, did you, Mr. Crane? A. No, sir.

Q. Now your wire of October 3rd stated, "Will forward confirmation for your signature as soon as received air mail from buyers." You testified, I believe, and it is correct, is it not, that you never received such confirmation from any of the buyers?

A. That is right.

Q. And you never forwarded any confirmation whatsoever to Mr. Kazanjian? A. No, sir.

Q. And you never received any such confirma-

(Testimony of Raymond M. Crane.)

tion or any other document signed by Mr. Kazanjian other than the wire of October 4th?

A. No, sir.

Q. And the Standard Memorandum of Sale that you mentioned yesterday as having been received by you from the Southwest Brokerage, you didn't forward that to Red Lion, did you?

A. No, sir.

Q. I believe you testified that so far as you [280] recall now you made no sales whatsoever prior to the time the ceiling went off for John Kazanjian where he paid you a commission?

A. Not that I remember.

Q. Any grapes that you may have purchased from John Kazanjian during the period where ceilings were on, were immediately accompanied by cash deposit by you, is that correct?

A. Well, if there were any bought that was the terms, that we had to pay for them; yes.

Q. And you paid that to Mr. Kazanjian in Exeter?

A. I don't recall that we bought any because this was the beginning of the Emperor deal, but that would have been the case.

Q. There was some testimony yesterday, Mr. Crane, regarding the Federal Market News. Isn't it true that normally the market price is reflected in those Federal Market prices probably 25 cents or so a package higher than the reasonable market value? [281]

* * *

The Court: You can answer the question and

(Testimony of Raymond M. Crane.)

then explain if you care to, that is, if you can answer it.

The Witness: I would say in many instances, yes.

The Court: Now do you wish to explain?

The Witness: I would like to explain.

The Court: Very well.

The Witness: Due to the character of the business and the commodity, it depends on the validity of the market report because many times the market report advances on a certain day very rapidly even after the bulletin is printed or goes to press in the afternoon, and sometimes the actual tone of the market is not reflected in a government bulletin by reason of lack of activity or some character like that in relation to the market. And we in the trade generally feel that the quotations in the market news service are generally quite [282] high.

The Court: They gather the information by calling people?

The Witness: Yes. They call each shipper every day and ask them what they are getting for grapes, and of course most of them are getting the top of the market or more.

Mr. Hayhurst: That is all.

The Court: On your Federal Market Service Report, I suppose that it is widely taken and distributed, but I take it that it is also regarded in the trade as more or less of a trend?

The Witness: Yes. It is regarded as a trend,

(Testimony of Raymond M. Crane.)

and then it has to be understood that there is a Market News Service that reflects major shipping points during active shipping season as to the f.o.b. carload price.

Then there is a Market News Service on prices that we consider jobbing prices to the retail stores, that is published in San Francisco, Los Angeles, Portland, Seattle, and all terminal markets that reflect the prices to the retail store after—well, as an example the market news report they showed me yesterday was of San Francisco, which would normally reflect a transportation charge to San Francisco, plus the normal profit for the jobber before it goes to the retailer. That would be published in the San Francisco report. [283]

* * *

Recross-Examination

By Mr. Hoppenstein:

Q. Mr. Crane, you hold yourself out as an experienced jobber, familiar with the trade practices in the fresh fruit and vegetable industry, do you not?

A. I have been in the business a long time.

Q. Now will you point out what the differences are in the form of the Standard Memorandum of Sale and the Standard Confirmation of Sale?

Mr. Hayhurst: We would object to that on the ground it is argumentative. The two documents speak for themselves. Again we renew our objection to the testimony regarding the trade custom.

(Testimony of Raymond M. Crane.)

The Court: The question is argumentative. Objection sustained.

Q. (By Mr. Hoppenstein): Mr. Crane, it is true, is it not, that you use the Standard Memorandum of Sale agreement more frequently than the Standard Confirmation of Sale agreement?

* * *

A. It depends on the individual.

Q. Have you had many business transactions with Southwest [284] Brokerage Company?

A. Not very many; no.

Q. During your dealings with them, did you receive the Standard Memorandum of Sale agreement from them? A. Yes.

* * *

Q. When you received such Standard Memorandum of Sale agreements, would you reject them and ask for a Standard Confirmation of Sale agreement? A. We have; yes.

Q. Did you do so in this case?

A. Not in this case because the ceiling went off.

Q. Except for the ceiling, it is true, is it not, that you consider the Standard Memorandum of Sale agreement submitted to you a submission to bind the deal as a custom and practice in the [285] trade?

* * *

A. We didn't figure that the deal was made or consummated. It was in between. That is the way I felt about it.

* * *

(Testimony of Raymond M. Crane.)

Q. Mr. Crane, on April 28, 1950, when your deposition was taken, at page 19, line 10, I will ask you if this question wasn't asked you and you answered:

"Q. As agent for the buyer, did you consider the telegram sent to you by Mr. Kazanjian, saying that the deal which you made was satisfactory, a sufficient memorandum of the contract to bind the deal?

"A. Under normal circumstances I would consider it sufficient."

A. That is correct.

Q. And as a usage of the trade, that was considered sufficient, wasn't it?

A. You are talking about two different things. You [286] are talking about a telegram from Mr. Kazanjian.

Q. Yes. I am talking about the telegram from Mr. Kazanjian.

A. A minute ago you were talking about a memorandum, one of these memorandum of sale forms.

Q. I am going to go back to that. Didn't you testify to that? A. Yes.

Q. That the telegram from Mr. Kazanjian was sufficient?

A. That is right. The telegram from Mr. Kazanjian, in my understanding, is the same as a signed document.

Q. You considered that the telegram was suffi-

(Testimony of Raymond M. Crane.)

cient as a Standard Confirmation of Sale agreement, didn't you? A. Yes, sir.

Q. And that is considered in the trade sufficient, is it not? A. Not in all instances; no.

Q. Well, it is considered sufficient by the Department of Agriculture, is it not? A. Yes.

Q. And as a broker, you are licensed by the Department of Agriculture, are you not?

A. We have to be.

Q. And in connection with your business, the rules and regulations of the Department of Agriculture are part and [287] parcel of the custom of the trade of your transacting your business, isn't that true?

A. Partially. However, that depends a lot on the individual firm. I know lots of firms that won't make a transaction unless it is a signed confirmation and they have a signed confirmation.

The Court: That is, on these forms?

The Witness: Yes.

Q. (By Mr. Hoppenstein): But as far as the custom of the trade is concerned, the Standard Memorandum of Sale is considered sufficient too, isn't it?

A. That is entirely an individual matter. I couldn't answer for them.

The Court: I understood you to testify yesterday that it is the only document that is frequently used when there is immediate delivery of the produce.

(Testimony of Raymond M. Crane.)

The Witness: Generally it is used by terminal market brokers, not by shippers.

The Court: Terminal market brokers when the produce is there?

The Witness: That is right.

The Court: When the goods are there?

The Witness: That is right. [288]

Q. (By Mr. Hoppenstein): Mr. Crane, how many written confirmation of sale agreements did you get from Mr. Kazanjian in disposing of the cars you disposed of for him in October and November of 1944?

* * *

The Witness: No.

Q. (By Mr. Hoppenstein): You didn't get any?

A. You mean a signed confirmation like you are talking about here?

Q. Yes. A. No, but we got a telegram.

Q. Did you get the Standard Confirmation of Sale agreements from your purchasers?

A. No.

The Court: Did you sell any futures?

The Witness: I don't think we did. I don't think we sold any. [289]

The Court: In other words, you just sold carload lots?

The Witness: That is right. We sold them and they were for future delivery.

Q. (By Mr. Hoppenstein): They were for future delivery, weren't they, Mr. Crane?

A. That is right.

(Testimony of Raymond M. Crane.)

* * *

Q. Mr. Crane, after you received the wire from Mr. Kazanjian and after you received the Standard Memorandum of Sale agreement from Southwest Brokerage, please state if you considered, in connection with the custom of the trade and in connection with this transaction, any other documentary evidence necessary before there would be a closed deal for the sale of these 10 cars of [290] grapes.

* * *

The Witness: Under normal circumstances I would consider it satisfactory. However, in this particular instance——

Mr. Hoppenstein: We object to——

The Court: He can explain his answer.

The Witness: In this particular instance we fully expected to receive a signed confirmation of sale which we requested.

The Court: Both from the buyer and the seller?

The Witness: From the broker. The broker normally [291] makes that out and forwards it to us when he requests it, and then we take it and deliver it to the seller and get him to sign it.

Q. (By Mr. Hoppenstein): Mr. Crane, did you request that of Southwest Brokerage?

A. I think we did; yes. I think we did request that in the original transaction. Then we got the broker's standard memorandum and the ceiling went off and that was all there was to it.

* * *

(Testimony of Raymond M. Crane.)

Q. Mr. Crane, I believe immediately before the recess I called your attention to page 20 of the April 28, 1950, deposition, at line 23:

“Q. Now, my question to you, Mr. Crane, is: Did you consider any other documentary evidence necessary before there would be a closed deal?

“A. Only the government inspection, that the merchandise was U. S. No. 1 grade.” [292]

Did you so testify?

A. That is right.

Q. Mr. Kazanjian did not submit to you the U. S. No. 1 government inspection certificates, did he?

The Court: That has been asked and [293] answered.

* * *

Recross-Examination

By Mr. Hayhurst:

Q. Any sales that you made for John Kazanjian after the ceiling price was off in 1944 were made under different circumstances than those existing while the ceilings were on, is that correct?

A. Yes, sir. [294]

* * *

The Witness: In relation to my previous testimony, when Mr. Hoppenstein was questioning me, I understood that he was referring to the confirmation from Mr. Kazanjian, not referring to the confirmation from the buyer.

Mr. Pines: I move that that statement be stricken on the ground that it is self-serving. [295]

The Court: He can explain his answer. He is entitled to that. Motion denied.

* * *

(Witness excused.)

* * *

HARRY BOCKSTEIN

recalled as a witness by and on behalf of the complainants in rebuttal, having been previously duly sworn, was examined and testified further as follows:

The Court: You were sworn before, Mr. Bockstein?

The Witness: Yes.

Direct Examination

By Mr. Hoppenstein:

Q. You are one of the partners of the West Texas Produce Company? A. I am. [296]

Q. How long have you been engaged in the produce business? A. Since 1905.

* * *

Q. Do you know what the custom of the trade in the produce business was in 1944?

* * *

A. Yes.

Q. State whether or not it was the custom of the trade to transact business under Standard

(Testimony of Harry Bockstein.)

Memorandum of Sale agreements submitted by brokers.

A. It was always just sales, just the broker would bring a sales agreement, a memorandum of sales or some of them called them confirmation, but it didn't make any difference.

Q. Do you recall in your experience in the produce [297] business being required to sign a Standard Confirmation of Sale agreement?

A. I don't. I don't recall.

Mr. Hoppenstein: That is all.

The Court: Did you ever in your conduct of the business require confirmation of sale to be signed by the seller?

The Witness: I did not.

The Court: You never received one?

The Witness: No. I don't think I ever received one. I don't recall.

The Court: You have never seen one?

The Witness: I didn't say I didn't see one, but I don't recall of ever seeing that one because I have always done business with a broker, and he would bring me the confirmation. The seller might be 2000, 3000 miles away.

* * *

Cross-Examination

By Mr. Wackerbarth:

Q. Mr. Bockstein, I show you Exhibit L and ask you if you have ever seen a Standard Confirmation of Sale like that before.

(Testimony of Harry Bockstein.)

A. (Examining exhibit.) I might have but I have never [298] signed one.

Q. You have never signed one? A. No.

Q. In your 30 or 40 years in the business?

A. Yes. I don't recall ever signing one.

The Court: Or ever making a transaction where the seller signed one?

The Witness: Where the seller signed one?

The Court: Yes, where you got a document like that signed by the person with fruit or vegetables or produce to sell.

The Witness: No, I don't recall of ever getting one where they have signed one. The only ones I ever got was from the broker and the seller was sent a bill.

Q. (By Mr. Wackerbarth): Mr. Bockstein, did you ever sell any carloads of produce for future delivery? A. Did I ever sell any?

Q. Yes. A. I don't think so.

Q. You don't think you ever did? A. No.

Q. Practically all of the sales that you make are where you have the merchandise available for present delivery?

A. I haven't sold very many—I am not a broker or [299] distributor, I am a wholesale man.

The Court: You sell to the retailer?

The Witness: I sell to the retailer.

Q. (By Mr. Wackerbarth): When you sell to the retail trade, do you take a Standard Memorandum of Sale?

(Testimony of Harry Bockstein.)

A. I don't make no memorandum of sale at all.

Q. You never have?

The Court: You just invoice them?

The Witness: I just invoice them.

Q. (By Mr. Wackerbarth): During this 40 years have you ever acted as a broker?

A. No, sir.

Q. So you do not know what the custom of the trade is then from the standpoint of a broker?

A. I have done business with brokers right along.

Q. But do you know what the custom of the brokerage trade is with reference to the sale on future deliveries?

A. Well, it is just the same way as it is in every other business and every other deal. I would get either a confirmation or Standard Memorandum of Sale. I never did pay any attention to the heading of it.

The Court: You do not know whether it was signed or was not signed, you merely got it from the broker? [300]

The Witness: I got it from the broker. He signs for the buyer and the seller.

Mr. Wackerbarth: That is all.

The Court: Step down.

(Witness excused.)

The Court: Do the complainants rest?

Mr. Hoppenstein: Yes. [301]

MEMORANDUM OPINION

The Court: The first thing to decide is whether or not there was a contract between Kazanjian and the complainants here. In my judgment there was not a meeting of the minds, and the motion for a judgment of dismissal on behalf of Kazanjian should be granted.

I cannot read the telegrams exchanged between the parties as counsel for complainants do. Whether you take the series of telegrams beginning with September 26th and winding up with the one sent at 5:25 p.m. on October 2nd, or whether you take just the telegrams of October 3rd and October 4th exchanged between Crane and Kazanjian, it seems to me that reading them all together it called—the first series called—for a confirmation in writing to be given by both parties, that is to say, both principals under the contract, or rather under the offer which was made on September 26th and which was not changed by the telegram of October 2nd, or the exchange of teletype messages between the parties on October 2nd.

The telegram to Kazanjian on October 3rd by Crane, as counsel pointed out in his analysis, could be considered a proposal but it certainly was not accepted. I cannot read the [392] telegram of October 4th as an acceptance, nor was there any oral testimony here upon which I could base a conclusion that there was an acceptance.

Mr. Kazanjian testified that he did not know anything about the telegram originally of Septem-

ber 26th that Crane had sent out, that he did not know its contents and had never heard of it until long after it had occurred. So he certainly could not have been bound, and there is no testimony that disputes it, by anything that was stated in those telegrams prior to October 3rd.

The \$2.50 price per lug is clear, the black Emperors is clear, five cars on a basis of \$750 and ten cars on a basis of \$1000 is clear, but the telegram to Kazanjian tied in the balance of his whole crop from Crane, that is to say, depending upon Mr. Crane being able to handle Kazanjian's whole crop that year or the balance of cars, as he put it.

The \$1000 deposit to be paid upon receipt U. S. 1 government inspection he proposed, but Kazanjian did not accept that \$1000 deposit on ten cars and \$750 on five cars. The phrase "said deposit to be paid immediately on inspection at shipping point" was certainly a rejection of that offer, and if it could be considered a counterproposal it was made on October 4th after the complainants claimed that they had entered into a contract with Crane, the broker or their forwarder, whichever way you may look at it, for delivery of the [393] grapes. And the proposal in the last clause or sentence in the telegram of October 3rd, "will forward confirmation for your signature as soon as received air mail from buyers," I cannot see how anything could be any clearer than that language makes it, that it was intended that the buyers should mail by air mail a confirmation and that it should be sent to Kazanjian for his signature.

Now the proposed memorandum of sale, which is in evidence here, as well as the Standard Confirmation of Sale, which is likewise in evidence as an exhibit, are both forms that are well known in the trade. They appeared to have been prescribed by some government agency or another. The memorandum of sale has no place on it in the form for the signature for either the buyer or the seller, whereas the Standard Confirmation of Sale in its form has a place for both the signature of the buyer and the seller. True, the seller could sign by broker or salesman but in that event you had to sign the certificate at the bottom.

So it seems to me that either that particular form or some other writing to be signed by both of the parties was contemplated in that offer of October 3rd which Kazanjian said he would accept. But it was never done. It was never a deal until that confirmation for signature of both parties as proposed by Mr. Crane, and as accepted by Mr. Kazanjian had materialized, and it never did. [394]

Moreover, the matter of storage, it is not clear in the October 3rd telegram because Mr. Crane did not say anything about storage but Mr. Kazanjian did. He said "you to arrange for storage as agreed." Now there was parol testimony here to the effect that Mr. Crane was to arrange to get the storage, and it certainly was not clear as to who was to pay for it except that Mr. Kazanjian testified that he was not to pay for it, and it would seem very logical, in view of the fact that the ceiling was \$2.50 and the condition of the market at that

time, he had no difficulty selling them and demonstrated that after the ceiling went off that the grapes went up, that it does not seem logical at all to me that Mr. Kazanjian would commit himself to pay 22 cents a crate total, 7 cents in charge and 5 cents a month for three months, and then reduce his price from \$2.50 down to the lower price of approximately \$2.28, which would have occurred.

So I cannot see that there was ever any meeting of the minds or ever any contract signed by the party to be charged. In the first place, there was no meeting of the minds; in the second place, there was never any contract signed by the party to be charged at all. The proposal which Mr. Kazanjian signed on October 4th was never accepted or never acted upon by the complainants in this case.

Moreover, I am satisfied that the cases, the Georgia Peanut case and the Wood Lumber Company case, are controlling [395] about requiring the authority of an agent to be in writing. Mr. Crane's authority was not in writing. There is nothing in the evidence to show that prior to October 2nd, which is the date that the complainants rely upon as being the date of the agreement, that Mr. Kazanjian ever gave Crane any authority in writing. In fact, not at any time other than it might be considered the October 4th telegram to Crane which might be considered as authority to go ahead and make the deal on that basis, which was not done.

If you take the other horn of the dilemma as to whose agent Mr. Crane was, there was certainly no

authority in writing to Crane from either one of the principals in Texas or the Southwest Brokerage Company, even assuming that they had authority or that the Southwest Brokerage Company had authority to act, there is nothing in writing from them to Crane authorizing him to commit them or authorize him to negotiate this proposed sale with Mr. Kazanjian.

Now has there been any ratification of that act of Crane if he was the agent of the complainants here by the filing of the case. In fact, they allege just the contrary. They allege that Crane acted both as a principal and as an agent of Kazanjian. So there is no ratification there, nor is there any ratification of it by filing this case in this court. In fact, the complainants here did not file the case in this court. [396]

Furthermore, I do not think it is necessary for the decision but I will indicate to counsel, because it has been known that I have been wrong before and have been reversed by the higher courts, that in the event some appellate court should disagree with me about whether there was or was not a contract, I will hold that as a matter of fact the ceiling price was \$2.50 and that the \$50 brokerage, or whatever sum it was to be paid, was to be made in connection with the sale and depended upon the sale, and therefore was in violation of Maximum Price Regulation 426, which was the controlling regulation in this instance.

In the event further that I am reversed in that connection, as well as the other one, I find as a fact

that on or about October 24th, that is to say, if I am reversed and it is held to be a contract, that on or about October 24th the complainants here acquiesced in the repudiation in so far as fixing a date for the accrual of damages, and I do so under the authority of the case of *Compania Engraw v. Schenley Distilleries* (181 F. (2d) 876) heretofore cited to counsel and decided by the Circuit Court in this district comparatively recently.

I find further as a fact that the testimony here that the price was \$3 to \$3.50—I have forgotten the exact price in that telegram by the Nash-De Camp Company—but I do not think that one single price would prevail, but the testimony [397] of Mr. Kazanjian and the testimony of Mr. Crane was that the price ranged between \$3 to \$3.50 between the dates of October up to the beginning of December, when they went higher, but I hold that on or about October 24th is the controlling time and that an average price would be \$3.25 a crate for the total tonnage which the plaintiffs would be entitled to in the event it is ultimately held to be a contract, which would be 75 cents a lug maximum. In other words, in the event the court holds that my ruling in connection with the OPA is wrong, it will be 75 cents a lug maximum damages for an average of 1105 lugs per car, or a total of 10 cars, or a total of 11,050 lugs, or a total in dollars—well, it is merely a matter of calculation.

That, however, is merely a contingent finding which counsel may or may not if they desire put into their findings of fact and conclusions of law.

I think that that disposes of the contentions which have been made of the parties. In connection with the contention by Mr. Crane, while it is urged here that under the law there was a possibility that Mr. Crane might have been held liable in damages, nevertheless the position which the complainants have taken that he was their agent precludes entirely a court from granting judgment against Mr. Crane because there is no charge here that he wilfully or fraudulently or for a fraudulent purpose made any statements to the complainants here to [398] the effect that he had confirmation. I have held that there was no contract and Crane did not have any authority to send those telegrams.

So the judgment of dismissal will be granted in favor of both respondent Crane and respondent Kazanjian. The parties will prepare findings of fact, conclusions of law and judgment accordingly and serve them. [399]

* * *

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes

Dated at Los Angeles, California, this 29th day
of September A.D., 1950.

/s/ AGNAR WOHLBERG,
Official Reporter.

[Endorsed]: Filed Feb. 27, 1951.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF HEARING
ON MOTION

November 6, 1950

Appearances:

For the Plaintiff:

HARRY A. PINES, ESQ.

975 Subway Terminal Building,
Los Angeles 13, California.

For Defendant Associated Fruit Distributors:

HENRY O. WACKERBARTH, ESQ.

601 Fay Building,
Los Angeles 13, California.

For Defendant Red Lion Packing Company:

NELSON HAYHURST, ESQ.

1014 Helm Building,
Fresno 1, California.

The Clerk: No. 8244, Civil, Central Fruit &
Vegetable Company v. Associated Fruit Distribu-
tors, et al.

Mr. Pines: Ready in that, your Honor.

The Court: How long do you want to argue that?

Mr. Pines: I don't think it should take more than a few minutes. What we are asking for is the privilege of presenting oral argument on the motion for a new trial.

The Court: I have read the motions and arguments and supporting authorities. In the parlance of the street, they kind of leave me sort of cold.

Mr. Pines: I hate to waste the court's time and my own, but I am so firmly convinced of the correctness of our position that I wanted the opportunity of arguing. Perhaps the very fact that the court is left cold by the written documents leads me to believe that I can persuade the court orally.

The Court: I cannot see any new point or new matter of law—can you, Mr. Wackerbarth?—brought up or touched on on the motions for a new trial.

Mr. Wackerbarth: I am afraid I will have to make an honest confession. I have been away from my office for two weeks on vacation.

The Court: How about you, Mr. Hayhurst? [2*]

Mr. Hayhurst: I must also confess I have been engaged in a trial, in a matter that arose involving certain contempt matters, as your Honor recalls, and they take considerable time and I unfortunately have not had too much time to examine it either.

Mr. Pines: Might I make one statement? Part of this motion is based upon law that was not avail-

*Page numbering appearing at top of page of original Certified Transcript of Record.

able to this court at the time of the trial, a decision of the Third Circuit Court of Appeals, and this question of the statute of frauds, which I believe is the first instance in which any circuit court has passed upon the relevancy of the statute of frauds to an action brought under the Perishable Commodities Act, and under the decision of the Third Circuit Court of Appeals it is the statute of frauds and the statute, such as the one we have in California, is not even available as a defense in this action. That was not argued to the court at the time.

The Court: No.

You will recall my decision was not based on that alone, but I held there was never any meeting of the minds anyway, either in writing or orally.

Mr. Pines: Well, if we go up on appeal and if that is the only basis of sustaining the court's decision, we would at least limit these issues rather than to have them go up on a number of other issues. [3]

The Court: I also feel that regardless of the Third Circuit Court of Appeals that the defense of the statute of frauds is available. In other words, I have read your brief through but I could not see how there was anything there to convince me to change my mind concerning the positions on the law which I took at the time of the trial.

Mr. Pines: If the court please, I don't want to be persistent, but I might state this, I filed a rather voluminous——

The Court: Persistence is a virtue.

Mr. Pines: Thank you.

I filed objections to these findings and I couldn't see how the court, if it heard oral argument on it, could possibly turn us down, that is, in certain instances.

The Court: That is the way I used to feel when I practiced law, I could not see how the court could possibly reach the decision it did.

Mr. Pines: We also ask to correct typographical errors which misquoted some exhibits. We ask that the findings be separately stated so that when we go up on appeal we will not have to call the appellate court's distinction to the 14th paragraph of Paragraph IV of the findings which is in accordance with good practice and according to the rules. I think had I had the opportunity of presenting this matter orally, perhaps the court might have noted that. [4]

The Court: No, any typographical errors, since I do not check findings for them, I leave that to counsel who has prepared them.

In so far as the basis of my decision is concerned, I do check them and they were in accordance with the basis of my decision.

Mr. Pines: I have made my motion.

The Court: Do you desire to file any reply memoranda, either one of you, or both of you?

Mr. Wackerbarth: If there is going to be an argument on it, yes, I would want to.

Mr. Hayhurst: Yes.

Mr. Wackerbarth: I assume that court is taking

the position now that you are going to deny—I may be wrong in this—deny the motion and it is not necessary to set it down for hearing.

The Court: I cannot see any virtue in hearing further argument on it. If counsel have not read it and desire time, maybe you will see some error that I was led into about which counsel is complaining.

Mr. Wackerbarth: I think we should give it consideration. As I say, I have been out of my office for two weeks and if there is any error in there that is apparent to me, I will come in and admit it.

The Court: I will give both parties 10 days to file a [5] reply to the plaintiff's motion for a new trial and points and authorities. They were served on counsel?

Mr. Hayhurst: Yes, sir.

Mr. Pines: Is the court granting the oral argument on this matter?

The Court: No.

Mr. Pines: May we have the privilege of replying to the replies?

The Court: Yes.

Mr. Pines: 5 days thereafter?

The Court: That is right.

Mr. Pines: Thank you.

The Court: 10 and 5, and at the end of the 15 days the mater will stand submitted.

Mr. Pines: Thank you. [6]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 24th day of February, A.D. 1951.

/s/ AGNAR WOHLBERG,
Official Reporter.

[Endorsed]: Filed Feb. 27, 1951.

PLAINTIFFS' EXHIBIT No. 2

[Title of District Court and Cause.]

DEPOSITION OF JOHN C. KAZANJIAN
taken on behalf of Complainants and Appellees, at
Suite 975 Subway Terminal Building, Los Angeles
13, California, on Friday, April 28, 1950, at 2:00
p.m., before Byron Oyler, a notary public within
and for the County of Los Angeles and the State of
California, pursuant to oral stipulation.

Apperances:

For Central Fruit & Vegetable Co., and West
Texas Produce Company, Complainants and
Appellees:

HARRY A. PINES and
J. MANUEL HOPPENSTEIN, by
HARRY A. PINES, ESQ.

For Raymond M. Crane, dba. Associated Fruit
Distributors of California, Respondents and
Appellees:

HENRY O. WACKERBARTH, ESQ.

For John C. Kazanjian, dba Red Lion Pack-
ing Company:

RALPH MORADIAN and
AYNESWORTH & HAYHURST, by
L. NELSON HAYHURST, ESQ.

Plaintiffs' Exhibit No. 2—(Continued)
(Deposition of John C. Kazanjian.)

JOHN C. KAZANJIAN

called as a witness on behalf of Complainants and Appellees, having been first duly sworn, deposed and testified as follows:

Direct Examination

By Mr. Pines:

Q. Your name is John C. Kazanjian?

A. That is right.

Q. You do business as the Red Lion Packing Company? A. That is right.

Q. Is that a fictitious firm name or sole proprietorship on your part? A. Yes.

Q. In September and October of 1944 and thereafter you were doing business as the Red Lion Packing Company? A. Yes, I was.

Q. What is your business?

A. Farming, packing and shipping of grapes.

Q. Any other commodities that you deal in?

A. I also have some plums.

Q. You know Mr. Crane doing business as Associated Fruit Distributors of California for a period of around ten years?

A. I think it is seven years.

Q. Seven years?

A. I think the first time we did business and met each [3*] other was in 1943, to the best of my recollection.

Plaintiffs' Exhibit No. 2—(Continued)

(Deposition of John C. Kazanjian.)

Q. Have you been doing business with him off and on since 1943? A. Yes, we have.

Q. As a matter of fact, during the year 1943 he handled all of your grapes, didn't he?

A. No, not all of them.

Q. A substantial portion of them?

A. I don't recall just what portion, but I know he did not handle all of them.

Q. Did he handle them as your broker or as procurement agent of other parties?

A. That is asking a very broad question because for a portion of that year we had a ceiling and for the last portion the ceiling was taken off of grapes which changed the picture entirely.

Q. During the time there was no ceiling Mr. Crane sold the grapes as your agent, did he not, and you paid him a commission?

A. If you will tell me which cars of grapes you are talking about I can give you a better answer.

Q. Generally before the advent of the OPA ceiling did Mr. Crane at least on some occasions sell grapes for you and did you pay him a commission as broker?

A. No. In 1943 the first year I dealt with Mr. Crane to the best of my recollection there was a ceiling on grapes [4] and I would pack the grapes and bill them Red Lion Packing Company to Red Lion Packing Company at an eastern destination. Before I made a diversion of these grapes I always got my check for the grapes before the diversion.

Plaintiffs' Exhibit No. 2—(Continued)
(Deposition of John C. Kazanjian.)

In 1943 Mr. Hoover, who worked for Mr. Crane, spent most of his time in Exeter and whenever he paid me for a car of grapes I changed title to the Associated Fruit.

Q. Your place of business is in Exeter, California, isn't it?

A. In Exeter, yes. That is the way we had been dealing in 1943 and 1944.

Q. Can you tell we whether or not, if not all, isn't it a fact that most of your grapes were handled through Associated in 1943 and 1944?

A. No.

Q. What other concerns did you sell those grapes through?

A. Well, most all of the sales during the ceiling were direct sales. The place used to swarm with buyers.

Q. Did Mr. Crane procure purchasers for you in 1943 and 1944?

A. My honest answer to that is I don't know whether Mr. Crane ate the grapes himself or what he did with them. He paid me by check and I diverted the cars to him.

Q. Mr. Hoover stayed around your place of business quite a bit of the time didn't he? [5]

A. Yes, he did.

Q. What was his purpose for being there?

A. His purpose in being there was to pay me for the grapes so that I could transfer title to him.

Plaintiffs' Exhibit No. 2—(Continued)

(Deposition of John C. Kazanjian.)

Q. You knew Mr. Hoover was not buying the grapes?

A. I knew Mr. Hoover was not buying the grapes, you say?

Q. That is right.

A. Well, sir, during the ceilings, like I said, the office was swarming with buyers. Mostly they were direct eastern buyers. They were not only buying at ceiling price, but they were offering from \$300 to \$500 in the black market in order to get hold of the grapes. Mr. Hoover was just another man in the office fighting for grapes. When we put out two or three cars of grapes a day we had twenty people begging for one car a day or one car a week or two cars a week. That was the picture under the ceiling. We never asked them what they were going to do with the grapes. We accepted the money and transferred title to the grapes.

Mr. Wackerbarth: Off the record.

(Discussion held off the record.)

Mr. Pines: Back on the record again.

Q. Mr. Kazanjian, didn't you tell Mr. Crane in September of 1944 that you were going to have fifteen carloads of grapes that you would like to put into storage for [6] delivery in December of 1944?

A. No.

Q. You did not?

A. Mr. Crane told me that he had storage space

Plaintiffs' Exhibit No. 2—(Continued)

(Deposition of John C. Kazanjian.)

and asked me if I would be interested in storing some.

Q. In other words, the discussion was initiated by Mr. Crane? A. That is right.

Q. And not by yourself? A. That is right.

Q. Did he come to you personally or did he telephone you on that?

A. We used to talk on the telephone sometimes two or three times a day or sometimes every other day, but we were continually in contact with each other.

Q. That continued on through the end of 1944, didn't it? A. That is right.

Q. In September, 1944, did you know that he sent out a wire to thirteen brokers throughout the United States advising that he could book fifteen carloads of grapes? A. Absolutely not.

Q. On October 2, 1944, you received a telephone call from Mr. Crane, did you not, advising you that he had sold fifteen carloads of grapes at 2.50 net to you for delivery in December? [7]

A. No. I talked to him, but that was not the exact substance of the conversation.

Q. Referring to that telephone conversation on October 2, 1944, I will ask you to relate to us what was said between the two of you at that time?

A. May I go back a little further and bring it up to date? I would like to tell you what went into the discussion of this storage deal on the fifteen

Plaintiffs' Exhibit No. 2—(Continued)

(Deposition of John C. Kazanjian.)

cars. This conversation was the follow-up of previous conversations and no different.

Q. I will let you tell it to us in your own words.

A. All right.

Q. Try to fix dates as much as possible.

A. Mr. Crane contacted me and said he had storage space. Storage space was very hard to find at that time. During the war I imagine the Government was using quite a bit of storage space and it was at a premium. He asked me if I would be interested in putting some cars in storage which I was, because according to the ceiling setup there were created markups and if I could hold the grapes until December 10 I could get the additional markup.

Mr. Crane said that he would give me that storage space providing I would handle all of the grapes through him. In other words, he had something valuable to offer and in exchange he wanted this additional revenue and wanted me to handle all of the rest of the grapes through him. He [8] said if I wouldn't do it he had other shippers who would give him additional business on the strength of this fifteen car storage space.

I told him if he could make proper arrangements to submit a deal on the storage, but not to tie it in with the rest of my grapes at the time. I laid down several conditions that I would insist on before I would go into a storage deal. The conversation on

Plaintiffs' Exhibit No. 2—(Continued)

(Deposition of John C. Kazanjian.)

October 2 was in line with a previous conversation. I restated the terms of what I would want before I made a deal. He never did tell me he had a deal made. We were just talking business.

Q. It is your statement on October 2 you did not authorize him to confirm a deal to Fort Worth and Dallas for ten carloads of grapes?

A. Absolutely not. As a matter of fact, I was never told who he was dealing with or whether he was buying these grapes for himself or who he was buying them for. The principals or the agents or whoever he was dealing with were never revealed to me.

Q. On October 2, 1944, didn't you tell him that you would accept \$2.50 net to you per lug for the grapes with respect to fifteen carloads, the understanding being that a thousand dollar deposit per carload would be paid on Government inspection as to ten cars and \$750.00 a car deposit would be paid on Government inspection as to five cars? [9]

A. This is the October 2 conversation?

Q. That is right.

A. The telephone conversation you are referring to?

Q. That is right.

A. That was part of the conversation, part of the things I demanded. That was the price structure. In addition to that I also insisted that I get paid cash in Exeter at the time of packing. I insisted that the buyer assume all risks in storage.

Plaintiffs' Exhibit No. 2—(Continued)

(Deposition of John C. Kazanjian.)

In other words, there wasn't enough markup to justify me assuming the risks in storage. I wasn't going to guarantee U. S. No. 1 out of storage.

The third thing I insisted on with Mr. Crane was that this deal was going to be independent and not be tied in with the rest of my grapes. I wasn't going to tie in all of my grapes on the strength of this fifteen cars of storage space.

Q. Did Mr. Crane tell you he had sold grapes for your account on October 2, 1944? A. No.

Q. He did not tell you that?

A. He didn't say he had sold grapes, no. He said he was working trying to get the deal that I wanted.

Q. On that same day did you receive a telegram from him advising you that he had sold for your account fifteen carloads on the basis of \$2.50 a lug net to you?

A. Is that the October 3 telegram you are referring to? [10]

Q. I believe it is October 2.

Mr. Wackerbarth: It is the 3rd, counsel.

Mr. Pines: I stand corrected. If you have it there, perhaps it is October 3.

The Witness: Yes. I received a telegram from Associated Fruit dated October 3, 1944.

Mr. Pines: I call your attention to the fact that the telegram starts off with the following language:

“Referring telephone have sold for your account

Plaintiffs' Exhibit No. 2—(Continued)

(Deposition of John C. Kazanjian.)

basis 2.50 lug net to you block Emperors mentioned . . .” et cetera.

Q. Mr. Crane, does that refresh your memory on that occasion, that is, in the telephone conversation that he advised you he had sold those grapes for your account?

A. I think the telegram here—

Q. My question is, with reference to the telephone conversation in which he told you he had sold these grapes, does that refresh your memory now as to that telephone conversation to the extent that you recall he did tell you he sold those grapes for your account?

A. No, it doesn't, and I don't think the telegram infers that.

Q. What is your interpretation of that telegram?

A. My interpretation would be this: Referring to the conversation we had and relative to fifteen car storage deal and in reference to the conditions you laid down I have sold [11] on account—and follow it from there.

Q. Is that the way you understand it, in this telephone conversation with respect to these terms which he mentions in this telegram that he had sold for your account?

A. My interpretation is in referring to the telephone conversation we had regarding fifteen cars of storage grapes that he went ahead and sold on the basis he specifies and in which I replied.

Plaintiffs' Exhibit No. 2—(Continued)

(Deposition of John C. Kazanjian.)

Q. Does that refresh your recollection of the telephone conversation, that he told you those things in the telephone conversation?

A. No. I just got through telling you my recollection of what the telephone conversation was. I laid down the principal conditions I would demand before I made a deal, before I would make a deal.

Q. Is there anything in this telegram to you from Mr. Crane any different to the terms and conditions which you laid down?

A. Yes, sir. This wire is very vague on the conditions that I insisted on and I was trying to clarify them and that is why I made this counter offer in my wire to him insisting on the same things I insisted on all the time. It is very vague in his wire and doesn't bring it out at all.

Q. Do you have the telegram in front of you that you sent to Mr. Crane? A. Yes. [12]

Q. Will you point out to me wherein your telegram to Mr. Crane, which is dated October 3—

A. October 4.

Q. —wherein you said to him that any of the terms that he outlined in his telegram to you were to be changed?

A. Yes. If I was willing to take the terms he offered I would have sent a simple wire saying "Deal O. K.," two words and that would have been sufficient. I would not have to specify all of these different conditions. It would have been a very simple matter for me to wire two or three words

Plaintiffs' Exhibit No. 2—(Continued)
(Deposition of John C. Kazanjian.)
saying "Deal is satisfactory," and that would be the way we usually operate when we are confirming something like that.

Q. In this wire you said, "Fifteen cars storage USONE Emperors December 10 conversion satisfactory at 2.50 FOB Exeter guaranty by buyer." Take that much of it.

That conversion has reference to delivery, doesn't it? A. Yes.

Q. What did you mean by conversion?

A. Title was to be converted December 10.

Q. \$2.50 is the sum that Mr. Crane offered to you in the previous wire, is that right?

A. That is right. That was the ceiling price.

Q. The price was FOB Exeter, is that right?

A. Do you mean Mr. Crane's offer? [13]

Q. Yes.

A. No. I didn't say FOB Exeter. Cash in Exeter is what I have always insisted on. In other words, I wanted my check delivered right there to me in my office, not mailed from some unknown buyer or any one else.

Q. The money was to be paid to you before you made delivery, in other words?

A. Before I released the car from my packing house I wanted the money there while I still had physical possession of my grapes.

Q. Is that what you understood by FOB Exeter?

A. Absolutely. I wanted to hold physical possession of my grapes until I had my initial check.

Plaintiffs' Exhibit No. 2—(Continued)

(Deposition of John C. Kazanjian.)

It was strictly a seller's market and we took advantage of it.

Q. If that is what you had in mind, wouldn't you say COD Exeter instead of FOB Exeter?

A. We don't use COD.

Q. FOB is a price determinable at the shipping point, that no shipping charges will be involved, but the price will be determined at Exeter, California?

Mr. Crane: That just means the base price.

Mr. Wackerbarth: Wait a minute. If you want to ask a question you may do so, but don't get this record all balled up.

The Witness: You didn't put it in question form.

Q. (By Mr. Pines): Am I wrong, Mr. Kazanjian? Do you have [14] an understanding different from mine with respect to the meaning of FOB? I understand FOB to mean that the price is determinable at the shipping point. For instance, when a price is quoted on an automobile FOB Detroit it means it will cost more to deliver in Los Angeles, and I am paying the price at Detroit and the buyer will have to pay the shipping expense from Detroit.

Isn't that your understanding of FOB?

Mr. Wackerbarth: There is one element, I think, that you left out, Mr. Pines, and that is freight on board the car; if it is sold FOB the seller has to put it on the car.

Mr. Pines: That is right.

Mr. Wackerbarth: Not only does he have to put

Plaintiffs' Exhibit No. 2—(Continued)
(Deposition of John C. Kazanjian.)

it on the car, but he has to make absolute delivery to the railroad company before title passes.

Mr. Pines: I was trying to get a very common understanding as to FOB. To me it affects the price.

Mr. Wackerbarth: I had a case out here where the stuff burned up before the railroad took it.

Mr. Pines: Anyhow, it still doesn't mean cash in advance. Do you understand my question, Mr. Kazanjian?

The Witness: I understand what you said, yes.

Mr. Pines: You understand FOB to mean anything other than that?

Mr. Crane: FOB means——

Mr. Pines: Just a minute, Mr. Crane. Off the record. [15]

The Witness: FOB taken in relation to the fact that these grapes were not going to be delivered to the buyer immediately, but were to be in storage first—my understanding of FOB was he was supposed to pay me in Exeter and not wait until they went into storage.

Q. (By Mr. Pines): Are you finished, Mr. Kazanjian? A. Yes.

Q. I don't want to interrupt you.

A. Go ahead.

Q. You understood there was to be an immediate payment on inspection at the shipping point, is that right? A. That is right.

Plaintiffs' Exhibit No. 2—(Continued)

(Deposition of John C. Kazanjian.)

Q. That deposit was to assure you of the good faith of the buyer?

A. That was to protect me.

Q. Now, where in these terms or in your wire did you require payment before delivery?

A. It says to be paid immediately on inspection at shipping point.

Q. That is the deposit?

A. What could be clearer than that?

Q. We are referring to the deposit there, aren't we?

A. That is right.

Q. That is the same thing as Mr. Crane offered you, and I refer to the telegram from Mr. Crane to you wherein [16] he says five cars basis \$750 car deposit, ten car basis \$1000 deposit to be paid upon receipt U. S. No. 1 inspection. Isn't that the same thing? This deposit was to be paid upon U. S. No. 1 Government inspection?

A. The difference could be this. The interpretation of his wire would be that if he was not buying this as a principal for himself, but was buying it for some eastern buyer, the eastern buyer could say, "I want that U. S. No. 1 inspection to arrive at my office and then I will mail a check to Red Lion Packing Company for the amount."

I wanted to guard against that. I wanted the buyer to have \$1000 ready and available and transfer it to me in Exeter at the time of packing, immediately on presentation of U. S. No. 1 at Exeter.

Now, two or three weeks can elapse between

Plaintiffs' Exhibit No. 2—(Continued)

(Deposition of John C. Kazanjian.)

that. One is cash in hand while I have physical possession of my grapes, and the other could be three weeks away from some unknown party whose check might bounce before it ever got to me.

Q. I don't want to be argumentative, Mr. Kazanjian, but here is a man who wired you and said he had sold something for your account on the following basis, and if you wish to disavow that authority you wouldn't say that the deal was satisfactory and repeat the terms. You would say "Deal not satisfactory. You have no authority to confirm this sale for me and I will make it only on the following [17] conditions." Is that right?

A. No, because if the deal was satisfactory I would have sent a simple wire saying "Deal satisfactory." I wouldn't mention these other terms.

Q. This was your method of suggesting that Mr. Crane had overstepped his bounds in selling?

A. I was reiterating the conditions that I insisted upon all the way through.

Q. I see.

A. Which were very, very indefinite and very unsatisfactory in his wire. His wire could be interpreted in a number of different ways and I wanted to clear it up and have a concise understanding of what I was insisting on and the deal I wanted to go along on.

Q. You did not take any further steps to relay that on to Mr. Crane until after the ceiling had been lifted, did you?

Plaintiffs' Exhibit No. 2—(Continued)

(Deposition of John C. Kazanjian.)

A. You are entirely wrong in that statement. We discussed this on the telephone the very next morning, several days before the ceiling was taken off.

Q. Mr. Crane testified in your presence that you did not refuse to ship these grapes until after a request had been made from Texas that the shipment dates be accelerated since the ceiling had been lifted and then for the first time you refused to ship them on the grounds that the ceiling had been lifted and you no longer felt obligated to ship [18] the grapes.

Was Mr. Crane wrong in his testimony?

A. That is Mr. Crane's testimony. That is not my testimony.

Q. You would say that he was not telling the truth?

A. I don't have to say that. All I say is this—

Q. Do you deny that is a correct statement?

A. You are interpreting what he said and either your interpretation of his testimony is wrong or his memory might be wrong, on the details of this transaction, and I am not going to say Mr. Crane is wrong.

Q. When did you first inform Mr. Crane that you would refuse to ship these grapes?

A. Mr. Crane telephoned me the following morning.

Q. When you say the following morning, what date are you referring to?

Plaintiffs' Exhibit No. 2—(Continued)
(Deposition of John C. Kazanjian.)

A. The day after October 4, which would be October 5.

Q. Mr. Crane telephoned you?

A. That is right.

Q. Tell us what that conversation was.

A. He wanted a clarification of my wire and I restated the conditions that I was trying to make in this wire.

He said he would send up Mr. Hoover to straighten the matter out and Mr. Hoover came up.

Q. Just a minute. Let's not leave that conversation yet. In that conversation did you tell Mr. Crane to cancel [19] any previous commitment made for the sale of these grapes?

A. Mr. Crane said he would contact the people he was working with and see if he could get the terms that I wanted. He said he felt very——

Q. What terms were discussed then?

A. The same terms that I had insisted on all the time. One was that I wanted my cash payment in Exeter.

Q. You mean cash prior to delivery?

A. No, cash at the time I presented the U. S. No. 1 inspection.

Q. Do you mean prior to inspection rather than after inspection?

A. Not prior to inspection, but immediately after presenting the inspection. I had to have the grapes in the car and the U. S. No. 1 inspection. This wasn't an isolated case. That is the way I

Plaintiffs' Exhibit No. 2—(Continued)

(Deposition of John C. Kazanjian.)

dealt all through 1943 and also all through 1944. It was a seller's market. We insisted on it. That is the way we did business. That was No. 1. Do you want me to go on to the others?

Q. Yes, go on through the entire conversation.

A. I refused to assume any risk in storage. That was the thing we were trying to hash out. That is another thing that is not clear in his wire, whether I am to assume the risk in storage or they.

Another thing, I didn't want to tie up all of my grapes on the strength of fifteen cars in storage. [20]

Q. Did you instruct Mr. Crane to notify his principals that the deal was off?

A. Mr. Crane had never told me who his principals were or who he was dealing with.

Q. Whoever they were, did you tell him there was no deal and he had no authority to confirm the sale in your behalf?

A. That is natural to assume.

Q. Did you or didn't you?

A. Let's follow the sequence of the conversation. That doesn't seem to fit in here. Will you restate that, please?

(Pending question read.)

Mr. Crane never did insist he had a deal. When I talked to him on this deal he was still going to try to get the conditions I insisted on. He said in his mind there was very little question but what he could make the necessary changes, and in the

Plaintiffs' Exhibit No. 2—(Continued)

(Deposition of John C. Kazanjian.)

meantime he was sending Mr. Hoover up to straighten the matter out.

Q. That was on October 5?

A. That was on October 5.

Q. Did Mr. Crane tell you he would communicate with the people in Texas to see whether or not they would revise the terms of that deal in accordance with your wishes?

A. He didn't tell me who he was communicating with.

Q. I didn't ask you whether he told you whom he was [21] communicating with. Did he tell you he would communicate with the people who were buying the grapes?

A. He said he would try——

Q. For the purpose of giving them the terms that you wanted?

A. He said he would try and secure the terms that I wanted.

Q. Do you know whether or not he engaged in any communications with his people thereafter with respect to changing the terms of the deal?

A. I haven't the least idea how he conducted his business or with whom.

Q. Did he tell you he had communicated with those people? A. Which people?

Q. The people who were buying the grapes.

A. No.

Q. Did you have any subsequent conversations

Plaintiffs' Exhibit No. 2—(Continued)

(Deposition of John C. Kazanjian.)

with Mr. Crane with respect to the delivery of these grapes? A. Yes, I think we did.

Q. When were those subsequent conversations?

A. Oh, maybe on the following day. We spoke every day.

Q. You think you had a conversation with him on the 6th of October?

A. I think we did. We spoke every day. [22]

Q. Did you ask him whether he had communicated with the buyers of the grapes to see whether they would change the terms of the deal?

A. I don't think we ever talked about this any more. I think the only other time we talked about this was on the 5th and we took it for granted it was forgotten after the ceiling came off on the 7th or 8th, three or four days later, and the deal was consummated, and the deal was never mentioned and never discussed again except once after this when he said these people were insisting on delivery and wanted to know if we could give them a little preference on some business, and I told him I would leave it to his judgment, if he felt he was under obligation to these people that we would go along and give them some business.

Q. It is your recollection that after October 5 you might have mentioned this matter only about once before a demand was made by the buyers for delivery?

A. I don't know whether it was before or after the demand was made by the purchasers.

Plaintiffs' Exhibit No. 2—(Continued)
(Deposition of John C. Kazanjian.)

Q. Is it your recollection that you had only one conversation with Mr. Crane after that demand was made? A. After the 5th?

Q. Yes.

A. After the demand, did you say?

Q. Yes.

A. I don't know when they made the demand. What was [23] the date?

Q. Do you remember the date when ceiling prices were lifted?

A. I am not certain, but I think it was the 7th or 8th to the best of my recollection because when Mr. Hoover came—the ceiling went off the day before, when he came the ceiling had gone off the day before.

Q. I believe it was October 12 that a request was made of Mr. Crane by the people purchasing the grapes for earlier shipment if possible. Did Mr. Crane communicate with you on that matter at that time? A. I don't remember. I doubt it.

Q. You doubt it?

A. Because it was only mentioned once after that, as I said. He suggested that we give them preference on some business which I said would be satisfactory with me. He said they were a good account.

Q. On October 10 the Southwest Brokerage Company wired to Mr. Crane asking for more speedy delivery. I don't have the date of the wire.

Plaintiffs' Exhibit No. 2—(Continued)

(Deposition of John C. Kazanjian.)

It is apparently a teletype message from Associated to Southwest Brokerage saying, "Red Lion takes the view ceiling lifted any contracts Emperors voided. Willing to go along and give you trade preference shipping as packed at market price which today is 3.25. Advise."

Did you authorize Mr. Crane to quote that market price of \$3.25 to the Southwest Brokerage Company? [24] A. After the ceiling went off?

Q. Yes.

A. Mr. Crane acted as my agent in selling my grapes. That is, I would give him authorization of a car or two cars at a time and he would sell at the best possible price. It was up to him to secure the best price. I would give him one or two cars to work on at a time and he would secure the best price. That was the way we did business the balance of the season after the ceiling came off.

Q. You haven't answered my question, Mr. Kazanjian. My question is whether or not Mr. Crane conferred with you after receiving the request on October 10 for earlier shipments and whether you authorized his reply to the effect you considered the deal voided and that you would ship at \$3.25.

A. I disagree with the statement I said it was voided because the ceilings had come off.

Q. He wasn't quoting you when he made that statement?

A. He wasn't quoting me literally, no.

Q. Directing your attention to the fact there

Plaintiffs' Exhibit No. 2—(Continued)
(Deposition of John C. Kazanjian.)

were a series of telegrams taking place between Mr. Crane and Southwest Brokerage, thereafter, I will ask you whether or not you were consulted by Mr. Crane during those negotiations?

A. I know Ray called up once and said they made a [25] demand on the grapes, but he said, "The hell with them. We have no deal. Let them holler for them all they want to." Those are the very words he used to the best of my recollection.

Q. Did you receive a telegram from the Southwest Brokerage Company demanding delivery of these grapes?

Mr. Hayhurst: Have you a copy of it, Mr. Pines?

Mr. Pines: I believe so.

Mr. Hayhurst: Show it to him. Maybe it will refresh his memory.

Q. (By Mr. Pines): You don't have any independent recollection? A. Not at this time.

Q. Directing your attention to a night letter dated October 13, 1944, Southwest Brokerage Company, Fruit and Vegetable Division, addressed to John Kazanjian, Red Lion Packing Company, Exeter, California, reading as follows:

"Re ten cars Emperors confirmed by you through Associated for West Texas Produce and Central Fruit we wiring Associated tonight offer of FOB plus ten per cent procurement charge unacceptable and buyers want contract fulfilled as confirmed. If not going through on this basis please so advise

Plaintiffs' Exhibit No. 2—(Continued)

(Deposition of John C. Kazanjian.)

immediately by wire as we desire to take action to protect their interests. Personally don't see how lifting ceiling has anything to do with contract made at definite price and Washington has wired us to this [26] effect."

Do you remember receiving that telegram?

A. May I see it?

Q. Yes, sir. This is a photostatic copy (handing document to witness).

A. Well, I really don't recollect it, but undoubtedly I received it. It has been so long ago I don't recall it.

Q. Do you have any recollection whether or not you replied to that telegram?

A. I don't know. I don't remember either one of them, to be honest with you. I think I can say I never replied if I did receive it because those people didn't mean anything to me. I never dealt with them. I don't know what claim they had against me and I didn't pay any attention to them.

Mr. Hayhurst: Is there supposed to be a reply to that, Mr. Pines?

Mr. Pines: There wasn't any that I know of.

Q. I will ask you whether or not for a matter of about a week after October 10 if Mr. Crane did not inform you from day to day that he was receiving telegrams and demands from the Southwest Brokerage Company insisting upon your compliance with this sale?

A. No. Just like I said——

Plaintiffs' Exhibit No. 2—(Continued)
(Deposition of John C. Kazanjian.)

Q. Mr. Crane did not inform you of that?

A. No, sir. I think only one time we talked about it. [27]

Q. Didn't you authorize him to make an offer of compromise sales on this transaction?

A. He asked me if we couldn't give him preference on some cars which I said I would be perfectly willing to do. He said some people had been insisting on delivery on the deal—I don't know what his feeling is now, but at the time he felt he had no deal consummated, but he said they were good customers and he would like to keep them happy. So he asked if we couldn't give him some preference on some cars and I said I didn't see why we couldn't.

Q. Did Mr. Crane inform you that Southwest Brokerage Company had wired him that they had wired Mr. Currie of the War Food Administration and asked whether or not the lifting of the OPA ceiling had any effect on the contract and had received advice from Mr. Currie to the effect that it had no such effect? A. I don't recall.

Q. You did not take this matter very seriously, did you? A. I took it very seriously.

Q. But you had only one conversation with Mr. Crane about it?

A. I took it very seriously, but when there was no contract made it was a dead issue and we went along with our business because we had a lot of business to attend to.

Plaintiffs' Exhibit No. 2—(Continued)

(Deposition of John C. Kazanjian.)

Q. Did Mr. Crane tell you that he had any telephone [28] conversations with the Southwest Brokerage Company on this matter?

A. I don't recall him telling me, no, sir.

Q. Did you have any arrangement with Mr. Crane where you were to share his procurement commission on this transaction?

A. I didn't know he was getting a procurement commission.

Q. It did not make any difference to you what sum of money he might get?

A. It didn't make a particle of difference.

Q. As far as you were concerned, it was strictly a deal for \$2.50 net per lug?

A. As far as I was concerned I wanted certain conditions met. Price was not the only thing.

Q. In so far as price was concerned, you were to receive \$2.50 net per lug?

A. As far as price was concerned I was to receive \$2.50 net per lug. I was operating strictly under the price ceiling. If I wasn't I could have accepted from \$300 to \$500 black market if I was interested.

Q. Did you eventually sell these grapes, these fifteen carloads?

A. I couldn't earmark those fifteen cars, but I sold all of my grapes that year.

Q. What did you get for grapes in December, 1944? [29]

Plaintiffs' Exhibit No. 2—(Continued)
(Deposition of John C. Kazanjian.)

A. I didn't have any in December.

Q. These grapes were disposed of before December of that year?

A. I didn't put any in storage.

Q. These grapes were sold in the latter part of October and November?

A. I think we packed until about, we finished packing about November 10.

Q. What prices did you get for Emperor No. 1 grapes during October and November, 1944?

A. I think we were getting mostly three and a quarter.

Q. What was the highest amount that you sold grapes for during that period of time?

A. I don't know, but I think three and a quarter, and there might have been some sales over that. I don't recall now.

Q. You could determine that from your records, could you not?

A. Yes, sir. There is one point that should be clarified. Sometimes we pack three grades: U. S. 1, U. S. 1 well within, and Unclassified.

Q. I am glad you called my attention to that. I had reference only to Emperor No. 1 as confirmed by Mr. Crane to Southwest Brokerage Company.

Mr. Hayhurst: We will object to the form of the question on the ground it assumes it was confirmed. [30]

Mr. Pines: It is admitted it was confirmed.

Plaintiffs' Exhibit No. 2—(Continued)

(Deposition of John C. Kazanjian.)

Mr. Hayhurst: I disagree with you. I think there is quite an issue.

Mr. Pines: You object to it, but Mr. Crane said he confirmed the deal.

Mr. Hayhurst: I object to the statement that Mr. Kazanjian confirmed the deal.

Mr. Pines: We are talking about these sales.

Q. What were the prices which you got for those particular grapes?

A. What do you mean by particular grapes?

Q. Mr. Crane undertook to confirm in your behalf ten cars of grapes to Southwest Brokerage Company which were described as Emperors No. 1. Now, what price did you get for the sale of those grapes when you sold them?

A. That is what I mean. I had about 115 cars of Emperor grapes that year and I don't know which fifteen cars you could earmark as these fifteen cars.

Q. These were to pass Government inspection U. S. 1. What did you get for Emperor grapes U. S. 1 Government inspection during October and November, 1944?

A. That is why I say there was a range. We pack some of our U. S. 1 which we call U. S. 1 well within. We try to make it better than U. S. 1, but it is still sold as U. S. 1. We occasionally put up a choice pack and get more money. The range was between 3.25 and 3.40. [31]

Q. What did you understand Mr. Crane to be

Plaintiffs' Exhibit No. 2—(Continued)

(Deposition of John C. Kazanjian.)

negotiating about here? Were they choice grapes? I refer to the telegram of October 2, 1944, in which Mr. Crane informed you that he had sold for your account five cars and ten cars of block Emperors No. 1. What grapes did you understand those to have been? Were they your choice quality?

A. U. S. 1 varies with the label. Some people's label of U. S. 1 is considerably better than others. That is why some people get a premium.

Q. Isn't U. S. 1 determined by Government inspection?

A. But the label makes a lot of difference.

Q. What kind of U. S. 1 did you have to offer for sale during that period of time?

A. I think mine was average.

Q. Average. In other words, they would have had to accept any grapes that would pass Government inspection as U. S. 1, is that right?

A. That is right, but on the market there is a range in price even with U. S. 1, depending on the particular label. Some people have spent a lifetime building up a label and they get a little higher price because for years they have constantly packed an excellent pack.

Q. In short summary, I understand it is your position that Mr. Crane was not your agent?

A. I am not a lawyer. I can't tell you whether he was my agent. I am giving you the background and the facts. That [32] is for you to decide.

Q. With respect to these ten carloads of grapes

Plaintiffs' Exhibit No. 2—(Continued)

(Deposition of John C. Kazanjian.)

which he told you he sold for your account, you did not consider him your agent?

A. I am not a lawyer. I don't know whether a man is my agent or not. I am giving you the facts. You decide that.

Q. You are not going to pay him anything for selling them? A. No.

Q. You had no interest in the commission he was going to earn? A. No.

Q. You did not care what he got for them?

A. No.

Q. As long as you got \$2.50 net to you plus whatever other terms you had set up?

A. That is right.

Mr. Pines: That is all.

/s/ JOHN C. KAZANJIAN,
Witness.

Subscribed and sworn to before me this 10th day of July, 1950.

/s/ RALPH MORADIAN,

Notary Public in and for the County of Fresno,
State of California. [33]

State of California,
County of Los Angeles—ss.

I, Byron Oyler, a notary public within and for the County of Los Angeles and the State of California, do hereby certify:

Plaintiffs' Exhibit No. 2—(Continued)

That, prior to being examined, the witness whose signature is affixed to the foregoing deposition, to wit, John C. Kazanjian, was by me sworn to testify the truth, the whole truth, and nothing but the truth;

That, the said deposition was taken down by me in shorthand at the time and place therein named, and was thereafter reduced to typewriting under my direction.

I further certify that I am not interested in the event of the action.

Witness my hand and seal this first day of May, 1950.

[Seal] /s/ BYRON OYLER,
Notary Public in and for the County of Los Angeles,
State of California.

Received in evidence July 11, 1950.

PLAINTIFFS' EXHIBIT No. 3

[Title of District Court and Cause.]

DEPOSITION OF RAYMOND M. CRANE
taken on behalf of Complainants and Appellees, at
Suite 975 Subway Terminal Building, Los Angeles
13, California, on Friday, April 28, 1950, at 2:00
p.m., before Byron Oyler, a notary public within
and for the County of Los Angeles and the State
of California, pursuant to oral stipulation.

Appearances:

For Central Fruit & Vegetable Co., and West
Texas Produce Company, Complainants and
Appellees:

HARRY A. PINES and
J. MANUEL HOPPENSTEIN, by
HARRY A. PINES, ESQ.

For Raymond M. Crane, dba Associated Fruit
Distributors of California, Respondents and
Appellees:

HENRY O. WACKERBARTH, ESQ.

For John C. Kazanjian, dba Red Lion Pack-
ing Company:

RALPH MORADIAN and
AYNESWORTH & HAYHURST,
L. NELSON HAYHURST, ESQ.

Plaintiffs' Exhibit No. 3—(Continued)
(Deposition of Raymond M. Crane.)

Mr. Wackerbarth: It is stipulated that the depositions may be taken at this time and that the witnesses may be cross-examined, and that the depositions are taken subject to reserving objections to questions except as to form. Is that agreeable?

Mr. Pines: So stipulated.

Mr. Hayhurst: In other words, we reserve the right to object to anything except as to the form of the question.

Mr. Wackerbarth: Yes.

Mr. Pines: It is further stipulated that the depositions may be signed before any notary public.

Mr. Wackerbarth: Yes.

RAYMOND M. CRANE

called as a witness on behalf of Complainants and Appellees, having been first duly sworn, deposed and testified as follows:

Direct Examination

By Mr. Pines:

Q. State your full name, please.

A. Raymond M. Crane.

Q. You are the Respondent and one of the Appellees in the case of Centaral Fruit and Vegetable Company and West Texas Produce Company against Raymond M. Crane and John C. [3*] Kazanjian?

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

Plaintiffs' Exhibit No. 3—(Continued)

(Deposition of Raymond M. Crane.)

A. I am the Respondent, the Associated Fruit Distributors of California.

Q. You do business as the Associated Fruit Distributors of California?

A. Yes, I did at that time.

Q. Is that a fictitious firm name?

A. That is right.

Q. All through the year 1944 you were so engaged?

A. That is right.

Q. How long have you known Mr. Kazanjian?

A. Oh, for ten years, approximately.

Q. How long have you done business with Mr. Kazanjian?

A. Eight years.

Q. Your own business is what, Mr. Crane?

A. Produce broker and distributor.

Q. Mr. Kazanjian is engaged in what business?

A. He is a grower, packer and shipper.

Q. Is there any particular commodity that he grows?

A. Grapes is one commodity he grows, and other lines, too.

Q. Does he have a firm name?

A. Yes.

Q. Is that the Red Lion Packing Company?

A. Yes.

Q. When did you first start handling grapes for Red Lion Packing Company? [4]

A. I don't remember exactly.

Q. In September and October, 1944, had you been authorized by the Red Lion Packing Company

Plaintiffs' Exhibit No. 3—(Continued)

(Deposition of Raymond M. Crane.)

to negotiate the sale of any grapes for such concern? A. Specifically, no.

Q. I direct your attention to the date of September 26, 1944, when a series of telegrams were sent by the Associated Fruit Distributors of California to various brokers throughout the United States—I think there were thirteen telegrams—stating that you could book Emperor grapes, and ask you whether or not you sent such a telegram?

A. Yes.

Q. Was that telegram sent at the instance or the request of Red Lion Packing Company?

A. No.

Q. Will you explain the circumstances under which you sent that telegram to these brokers?

A. Our business is a brokerage business and naturally we were anxious to procure business. We knew these grapes were being packed. We knew they were available. We talked to Mr. Kazanjian about them and he indicated that providing we were interested or could interest anybody he would be willing to sell these grapes.

Q. One of those telegrams was sent to a concern called the Southwest Brokerage Company at Dallas, Texas, was it not? [5] A. That is right.

Q. On October 2, 1944, you sent another telegram to Southwest Brokerage Company with respect to some grapes with some revised terms, is that right? A. Yes.

Q. Were those revised terms the subject matter

Plaintiffs' Exhibit No. 3—(Continued)

(Deposition of Raymond M. Crane.)

of any discussion between you and Mr. Kazanjian?

A. Yes.

Q. Will you tell us what discussion you had with Mr. Kazanjian with respect to the terms of the offering?

A. As explained in these telegrams—I could offer those telegrams as the basis of the substance of our conversation as to the terms that he was willing to sell these grapes which we conveyed to the Southwest Brokerage Company.

Q. At the time of the sending of the telegrams under date of September 26, 1944, and October 2, 1944, were you soliciting these brokers to employ you as a procurement agent, as their procurement agent for the sale of these grapes?

A. We were soliciting business, yes, as their procurement agent, broker, which is our normal business.

Q. In the telegram of September 26, 1944, were the words "We charge fifty dollars per car procurement charge."

Was it your intention that that be the fee which was to be paid to you as agent of the buyers in connection with procuring those grapes? [6]

A. Correct.

Q. Do you recall the reply that you received on October 2, 1944, from Southwest Brokerage stating that a deal for ten cars of grapes, six going to Fort Worth and four going to Dallas was O.K. at the

Plaintiffs' Exhibit No. 3—(Continued)
(Deposition of Raymond M. Crane.)

quoted price of \$2.50 net and \$50 to you per car if the same was legal?

A. Well, whatever the telegram would bear out—I would recognize that we received it.

Q. Do you have any recollection of the Southwest Brokerage Company raising the point of whether or not \$50 a car to you was a legal charge?

A. It has been so long ago I can't remember specifically at the moment.

Mr. Wackerbarth: Do you have a copy of it? We have one here, I believe.

Mr. Pines: I would like to have his reply, also.

The Witness: I know we got a wire, but as far as the \$50 I don't just happen to remember specifically.

Mr. Wackerbarth: Here is where it starts. Here is your series of telegrams. You can start glancing through them. This is the Report of the Agriculture Department that he is looking at, Mr. Pines.

Mr. Pines: All right.

Mr. Wackerbarth: Do you find it?

The Witness: I don't seem to see it.

Mr. Pines. I have a copy of your reply in which you [7] say that it is legal, natural, and so on and so forth.

The Witness: I have it here now.

Mr. Pines: Will you read that, please?

The Witness: Referring to——

Mr. Pines: What are you reading from?

Plaintiffs' Exhibit No. 3—(Continued)
(Deposition of Raymond M. Crane.)

The Witness: I am reading from a teletype dated October 2, I think it is.

Mr. Hayhurst: You are actually reading from the photostatic copy of what purports to be a teletype.

The Witness: That is right.

Mr. Pines: Go ahead, Mr. Crane.

The Witness: "Referring that six car Emperors Fort Worth and for Dallas deal O.K. 2.50 net \$50 for you if legal. Presume it is legal or you wouldn't offer it."

Do you want me to read the rest of it?

Q. (By Mr. Pines): Yes, read the rest of the telegram. First, let me ask you, Mr. Crane, this telegram is from whom to whom, or this teletype?

A. This purports to be from the Southwest Brokerage Company to the Associated Fruit Distributors of California.

Q. Is there any other portion that you haven't read?

A. Yes. My answer was: "Haven't been able to contact"——

Q. Just a moment. Was there anything else in the other document? Wasn't something said "Advise G. A."?

A. Yes. It means go ahead. [8]

Q. All right.

A. "Haven't been able to contact the shipper yet but sure it is O.K. Wire you definitely one way or other as soon as get him."

"Yes, it is legal, natural as receiver can pay his

Plaintiffs' Exhibit No. 3—(Continued)

(Deposition of Raymond M. Crane.)

whole markup for buying brokerages if he wants to. Will wire you as soon as receive definite confirmation. I understand it is based on thousand dollar deposit against each USONE inspection as they are loaded." That is all there is pertaining to this deal here.

Q. You were actively interested in the brokerage business in this area in October of 1944, were you not? A. Yes.

Q. Was it a matter of common practice and custom for you to solicit other brokers to use your services as a procurement agent and pay for same during this period of time?

A. It was at that particular period of time, yes.

Q. Had you made any investigation at all to determine whether there was anything illegal about making a procurement charge which when added to the price which the purchaser was paying to the seller might exceed the OPA ceiling?

A. Yes, We talked to our legal counsel about that.

Q. Who was that?

A. I think we talked to the OPA themselves. We talked to Mr. Wackerbarth and talked to Mr. Weickert. I don't [9] remember now, but I know we talked to legal counsel on the matter.

Q. Were there any written rulings furnished you in connection with the propriety of making a procurement charge?

Plaintiffs' Exhibit No. 3—(Continued)

(Deposition of Raymond M. Crane.)

A. I can't recall at the present time. I think we had some at the time on it. It was from the OPA at that time.

Q. Would your records be available at this time for you to search and see whether or not you had any?

A. It has been so long ago now. I have disposed of all the records.

Q. You have disposed of all of those records. You are familiar with the fact that it was common practice for the broker to act for the buyer and pay a brokerage procurement charge?

A. Very common practice. That is the only way the broker could exist because ceilings were set and the buyer was entitled to hire any one he wanted to buy for him if he wanted the merchandise.

Q. Does the file that you have there show the subsequent telegrams?

Mr. Wackerbarth: This can be on or off the record. I have given the witness the file of the Report of the Investigating Committee. Do you have one?

Mr. Pines: I don't have one, but it covers the correspondence. [10]

Mr. Wackerbarth: It covers everything.

Q. (By Mr. Pines): Directing your attention to a night letter sent by you to the Southwest Brokerage on October 2, 1944, which says:

"Secured Redlyon Packing Company confirmation ten cars grapes as outlined you collect deposits

Plaintiffs' Exhibit No. 3—(Continued)

(Deposition of Raymond M. Crane.)

to be forwarded to us soon JUPA"—which I understand means Government inspection—"wire each car." Do you see that message, Mr. Crane? It it referred to here as a night letter so it would be in telegram form.

Mr. Wackerbarth: Here is a copy of it (indicating).

Q. (By Mr. Pines): I will ask you, Mr. Crane, whether or not you had a long distance telephone conversation with Mr. Kazanjian before you sent that wire? A. Yes, sir.

Q. Will you tell us as best you can what was said in that conversation?

A. Mr. Kazanjian confirmed to us, as agents for the buyer, the carloads of grapes in question under the terms and on the basis of the telegrams that we have mentioned here that were sent back and forth and was later confirmed by Mr. Kazanjian's wire to us as of the next day, as I recall.

Q. You talked to Mr. Kazanjian on many occasions by telephone, is that right?

A. Yes. [11]

Q. You recognized his voice in this particular conversation, did you not? A. Sure.

Q. In this conversation did you relate to him the terms that had been agreed upon with Southwest Brokerage Company with respect to the sale of this carload of grapes? A. Yes, sir.

Q. Or I should say ten carloads of grapes, and Mr. Kazanjian at that time told you that it was a deal and you could go ahead and confirm it?

Plaintiffs' Exhibit No. 3—(Continued)

(Deposition of Raymond M. Crane.)

A. That is right.

Q. I refer you to a telegram, Mr. Crane, from you to Mr. Kazanjian, dated October 2, 1944, which starts out as follows:

“Referring telephone have sold for your account basis 2.50 lug net to you block Emperors mentioned * * *”

A. That is right.

Q. That conversation referred to in that telegram is the telephone conversation you have just testified concerning?

A. Yes, sir.

Q. The terms mentioned in this telegram are the terms discussed between you and Mr. Kazanjian in that telephone conversation that preceded the sending of that telegram?

A. Yes, sir.

Q. Did you receive a reply from Mr. [12] Kazanjian?

A. Yes, sir.

Q. Do you have that before you?

A. Yes, sir.

Q. That is the telegram that reads as follows:

“Fifteen cars storage USONE Emperors December tenth conversion satisfactory at two dollars and fifty cents FOB Exeter guaranty by buyer one thousand dollars deposit on ten cars and seven hundred fifty dollars on five cars said deposit to be paid immediately on inspection at shipping point you to arrange for storage as agreed balance of pack intend to load after October twentieth will be glad to make deal on same about fifteenth of October.”

Is that the telegram you received from Mr. Kazanjian?

A. Yes, sir.

Plaintiffs' Exhibit No. 3—(Continued)

(Deposition of Raymond M. Crane.)

Q. Was there anything in that telegram that indicated to you that Mr. Kazanjian was quoting terms different from or other than those terms which he had authorized you to confirm to the Southwest Brokerage Company?

A. They are the same terms that we offered to the Southwest Brokerage Company.

Q. Shortly thereafter the Southwest Brokerage Company sent you a standard memorandum of sale on this transaction, is that right?

A. Yes, sir.

Q. Do you have that in front of you? [13]

A. Yes, sir.

Q. Do you recall receiving the standard memorandum of sale?

A. I don't recall specifically receiving it, but here is a photostatic copy of it or what purports to be a photostatic copy of it.

Q. What did you do with that standard memorandum of sale when you received it?

A. I think we probably filed it.

Q. Was there anything in that Memorandum of Sale containing the terms different from or other than those terms of sale which had been confirmed in the telegraphic correspondence that we have mentioned previously?

A. In substance, the confirmation is the same. There are a few small differences, but in substance I would say the confirmation is the same.

Q. Was there anything about the Standard

Plaintiffs' Exhibit No. 3—(Continued)

(Deposition of Raymond M. Crane.)

Memorandum of sale that would cause you or that did cause you to cause any correction to be made in it?

A. Well, I don't recall specifically right at the moment without checking back on those telegrams.

Q. Did you communicate with the Southwest Brokerage Company in any manner or form for any correction as to the Standard Memorandum of Sale?

A. I don't specifically recall right offhand at the moment. [14]

Q. On or about October 11, I believe it was, did you receive a communication from the Southwest Brokerage Company advising you that the buyers of the grapes, in view of the fact that the OPA price ceiling had been lifted, would like to have delivery prior to December 10, at least as to some of the grapes?

A. Yes, I remember receiving a wire like that.

Q. Do you have that in front of you, Mr. Crane?

A. Yes.

Q. Will you please turn to your reply to that?

A. It isn't here.

Q. Then I will read it to you:

"Shipper Red Lion takes view account ceiling lifted any contracts Emperor is voided. Willing go along give you trade preference shipping as packed at market price which today 3.25. Advise. Associated Fruit Distributors of California."

A. Yes, I remember that.

Plaintiffs' Exhibit No. 3—(Continued)

(Deposition of Raymond M. Crane.)

Q. When you received the request from the Southwest Brokerage Company for an accelerated shipping on these grapes, did you then communicate with Mr. Kazanjian? A. Yes, sir.

Q. How did you do that? A. By phone.

Q. By telephone? A. Yes. [15]

Q. Will you tell us as best you can what was said in that conversation?

A. His view in relation to that was the fact that this ceiling was changed more or less in the middle of the transaction, before the grapes were picked and put into storage, that the ceiling had gone off and the people hadn't put up their deposits and he felt due to that fact there wasn't any contract and he wasn't going to deliver.

Q. Did Mr. Kazanjian assign any other reason for his refusal to ship the grapes?

A. It was mainly the fact that they hadn't sent any money, that there had not been any transaction completed because of the change in the ceiling price, or the abandonment of the ceiling.

Q. They were not in default with respect to the payment of any money, were they?

A. I wouldn't say exactly, but I would say there was no definite meeting of the minds in the whole transaction. The ceiling changed before it was consummated because it was not consummated in my opinion until such time as money changed hands.

Q. When you speak of a meeting of the minds,

Plaintiffs' Exhibit No. 3—(Continued)

(Deposition of Raymond M. Crane.)

Mr. Crane, there was a meeting of the minds with respect to the terms of this transaction, wasn't there?

A. I would say yes, but the ceiling changed before the contract had a chance to be [16] completed.

Q. The money to be paid was to be paid upon U. S. Government inspection, is that right?

A. That is right.

Q. Had that inspection taken place?

A. No.

Q. So that the buyers were not obligated to send any money until that inspection took place, were they?

A. Well, I wouldn't say they were, no, not until inspection took place.

Q. So when you say there was a failure to have a meeting of the minds you mean that you or Mr. Kazanjian were under the impression that you were dealing only with respect to a situation in which there was a price ceiling and the price ceiling having been lifted you no longer saw the desirability of the deal from your point of view?

A. That is right—well, that wouldn't be of benefit as far as that is concerned, but I tried and did get Mr. Kazanjian to endeavor to deliver, but he wouldn't by reason of the fact the ceiling went off.

Q. Did Mr. Kazanjian, prior to your sending

Plaintiffs' Exhibit No. 3—(Continued)

(Deposition of Raymond M. Crane.)

this last telegram, advise you that he was not going to ship these grapes?

A. I don't understand your question. (Question read.) I don't remember.

Q. Had he given you instructions to try to cancel the deal earlier you would have communicated that information [17] to the Southwest Brokerage Company, would you not?

A. Oh, sure, absolutely, because we were anxious to make the deal ourselves. After all, we had the brokerage in it and that is the only opportunity we had for getting anything out of it.

Q. You don't have any interest in the Red Lion Packing Company, Mr. Crane?

A. No, sir.

Q. And Mr. Kazanjian has no interest in the Associated Fruit Distributors of California?

A. No, sir.

Q. Was there any deal between you whereby he was to participate in the brokerage commission that you were to earn in this transaction?

A. No, sir.

Q. Did you ultimately sell these grapes for Mr. Kazanjian?

A. I don't think we did. I think we had sort of a disagreement. I don't recall that we sold these grapes at all.

Q. You have done business for him since, have you not?

Plaintiffs' Exhibit No. 3—(Continued)

(Deposition of Raymond M. Crane.)

A. Yes, in rare instances—not so much, though—an odd car.

Q. Did you discuss your brokerage commission, the \$50 per car, with Mr. Kazanjian?

A. No, sir. [18]

Q. Did you tell him what you were charging per car? A. No, sir.

Q. He didn't ask you what you were charging as brokerage commission?

A. No. We don't necessarily do that, especially if we are acting as an agent for the buyer.

Q. Mr. Kazanjian definitely understood you to be the agent for the buyer and not for himself?

A. That is right.

Q. As agent for the buyer, did you consider the telegram sent to you by Mr. Kazanjian, saying that the deal which you made was satisfactory, a sufficient memorandum of the contract to bind the deal?

A. Under normal circumstances I would consider it sufficient.

Q. What about these circumstances?

A. In these circumstances where the ceiling was involved, where Government inspection was a part of the terms of the contract, where the dates of shipment—I would say that it would depend upon the ability to fulfill the contract on the part of the shipper or packer and it would depend a great deal on subsequent conditions and happenings as may evolve.

Plaintiffs' Exhibit No. 3—(Continued)
(Deposition of Raymond M. Crane.)

Q. I don't think you understand my question, Mr. Crane. You make these deals every day in the course of your business in selling or buying for particular principals. [19]

You had received an offer from the Southwest Brokerage Company for two concerns, one of which was in Dallas and one of which was in Fort Worth?

A. I wouldn't say we received an offer. I would say we received an order to buy.

Q. That is right. A. For a principal.

Q. You related that offer to Mr. Kazanjian over the telephone? A. That is correct.

Q. In your conversation with him you disclosed all of the terms of that offer? A. Yes, sir.

Q. In this conversation he told you those terms were satisfactory and to go ahead with the sale?

A. Yes, sir.

Q. You then corroborated that by your telegram to Mr. Kazanjian, referring to the telephone call?

A. Correct.

Q. And in turn he sent you a wire telling you that the deal was satisfactory? A. Correct.

Q. Now, my question to you, Mr. Crane, is: Did you consider any other documentary evidence necessary before there would be a closed deal?

A. Only the Government inspection, that the merchandise [20] was U. S. No. 1 Grade.

Q. That is only with respect to the delivery of the grapes and the payment for them?

A. That is what I meant by my prior statement.

Plaintiffs' Exhibit No. 3—(Continued)

(Deposition of Raymond M. Crane.)

Q. You say you did urge Mr. Kazanjian to fulfill his agreement to ship these grapes?

A. Yes, sir.

Q. At that time he was contending that because of the OPA ceiling being lifted he did not feel obligated to deliver them? A. Yes, sir.

Q. Did you tell him you felt that that was not a meritorious defense or meritorious reason not to deliver these grapes?

A. Well, I used all of the arguments I could think of, that I knew of at the time with relation to it.

Q. He nevertheless refused to ship them?

A. That is right.

(At this point the deposition of Mr. John C. Kazanjian took place, after which Mr. Pines asked the following questions of Mr. Crane:)

Q. Mr. Crane, you heard Mr. Kazanjian's testimony this afternoon? A. Yes, sir.

Q. You may recall that in his testimony he stated on October 2, 1944, in a telephone conversation between the two [21] of you, that he had not authorized you to confirm the sale to the Southwest Brokerage Company. Is that true or isn't it true?

A. Specifically the way you put it, I would say that that was untrue.

Q. He did authorize you to confirm it?

A. No, but the way you put it is not true.

Q. What is true?

Plaintiffs' Exhibit No. 3—(Continued)
(Deposition of Raymond M. Crane.)

A. He said that he would be agreeable and that I could be assured of these grapes under the specific terms that we outlined to Texas.

Q. You told him you sold these grapes, didn't you?

A. I told him I sold the grapes, but I didn't say who I sold to.

Q. But you told him you sold the grapes?

A. Yes.

Q. And you told him the basis on which you sold them?

A. That is right.

Q. He said that was satisfactory?

A. That is right.

Q. Then you sent your wire confirming the fact you had sold the grapes?

A. That is right.

Mr. Pines: That is all. Do you have any questions?

Mr. Wackerbarth: No questions. [22]

Mr. Hayhurst: No questions.

.....,

Witness.

Subscribed and sworn to before me this day
of, 1950.

.....,

Notary Public in and for the County of Los Angeles,
State of California. [23]

Plaintiffs' Exhibit No. 3—(Continued)

State of California,
County of Los Angeles—ss.

I, Byron Oyler, a notary public within and for the County of Los Angeles and the State of California, do hereby certify:

That, prior to being examined, the witness whose signature is affixed to the foregoing deposition, to wit, Raymond M. Crane, was by me sworn to testify the truth, the whole truth, and nothing but the truth;

That, the said deposition was taken down by me in shorthand at the time and place therein named, and was thereafter reduced to typewriting under my direction.

I further certify that I am not interested in the event of the action.

Witness my hand and seal this twenty-ninth day of April, 1950.

.....,
Notary Public in and for the County of Los Angeles,
State of California.

Received in evidence July 11, 1950. [24]

PLAINTIFFS' EXHIBIT No. 4
(Designated Portions)

[Title of District Court and Cause.]

DIRECT INTERROGATORIES TO BE PRO-
POUNDED TO THE WITNESS, JOE
MOESMAN

Interrogatory Number One

Q. Please state your name, address and occupation.

A. Joe Mosesman, 2009 Cadiz Street, Dallas, Texas—wholesale produce dealer.

Interrogatory Number Two

Q. Please state whether or not you are a licensed produce dealer from the United States Department of Agriculture.

A. Yes, I am.

Interrogatory Number Three

Q. Please state how many years' experience you have had in the fresh fruit and vegetable business and in what capacity.

A. Over forty years. Operator of wholesale produce business.

Interrogatory Number Four

Q. Directing your attention to on or about October 3, 1944, state what business you were engaged in and in what capacity.

A. Wholesale produce dealer, handling fresh fruit and vegetables in the capacity of partner and general manager of Central Fruit and Vegetable Company. In 1944, Central Fruit and Vegetable

Plaintiffs' Exhibit No. 4—(Continued)

Company was a partnership composed of myself, Morris Lipshitz and Sylvia Schwartz. I am now sole owner.

Interrogatory Number Five

Q. Directing your attention to on or about October 3, 1944, state if you know who and what Central Fruit and Vegetable Company was and the type business it was engaged in.

A. Central Fruit and Vegetable Company, as stated in the other question, was a partnership composed of myself, Morris Lipshitz and Sylvia Schwartz, and was engaged in the business of operating a fresh fruit and vegetable business at wholesale. I am now sole owner.

Interrogatory Number Six

Q. Directing your attention to on or about October 3, 1944, state whether or not the standard memorandum of sales agreement of the Southwest Brokerage Company attached to Complainant's complaint is a true copy of the memorandum of sale entered into by you.

A. Yes, it is a true copy.

Interrogatory Number Seven

Q. State whether or not the standard memorandum of sale agreement of the Southwest Brokerage Company, dated October 3, 1944, attached to Complainant's report, correctly reflects your understanding of the purchase of the grapes involved in the transaction.

Plaintiffs' Exhibit No. 4—(Continued)

A. Yes, it correctly reflects my understanding of the purchase of the grapes involved and is the memorandum of sale agreement presented to me by Southwest Brokerage Company and we agreed to the purchase on the terms set forth in the memorandum.

Interrogatory Number Ten

Q. State whether or not you were ready, willing and able on and after October 3, 1944, to accept and pay for the grapes described in the standard memorandum of sale agreement above mentioned and had the cash with which to pay for said merchandise.

A. Yes, I was ready, willing and able to accept and pay for the grapes and had the cash with which to pay for the merchandise and comply with the agreement.

Interrogatory Number Eleven

Q. State if you know whether or not West Texas Produce Company was financially able on and after October 3, 1944, to perform its financial obligation under the aforementioned standard memorandum of sale agreement.

A. I do know from personal knowledge of business and financial statements that West Texas Produce Company was financially able on and after October 3, 1944, to perform its financial obligation under the memorandum sale agreement involved in our suit against Associated Fruit Distributors and Red Lion.

Plaintiffs' Exhibit No. 4—(Continued)

Interrogatory Number Fourteen

Q. When did you learn that neither Red Lion Packing Company or Associated Fruit Distributors of California was not going to deliver you the grapes ordered?

A. Sometime in October, about October 10, 1944, or October 11, 1944.

Interrogatory Number Fifteen

Q. State whether or not you made any effort to obtain the purchase of ten other cars of grapes.

A. Yes, I did. I instructed and gave orders to several brokers in Dallas to attempt to obtain other grapes. Brokers were J. Margules of Southwest Brokerage Company, Bill Taylor, Roy Wright and Vance Smith. These instructions to purchase were given in October, November and December, 1944.

Interrogatory Number Sixteen

Q. Please state what efforts you made to obtain the purchase of additional cars.

A. Grapes were scarce and the demand was great and I made repeated calls on the brokers to attempt to get confirmation for the purchase of grapes.

Interrogatory Number Seventeen

Q. State whether or not you made every effort to procure the purchase of replacement cars of grapes.

A. Yes, I tried very hard and did everything I could to attempt to procure the purchase of replacement cars of grapes.

Plaintiffs' Exhibit No. 4—(Continued)

Interrogatory Number Eighteen

Q. How many cars were you able to purchase in replacement of these cars of grapes?

A. I was able to purchase the following: October 24, 1944, one car, 1,125 lugs, from Heggblade-Margules Co.; and $\frac{1}{2}$ car from Western Fruit Growers, 1,105 lugs, January 15, 1945; $\frac{1}{2}$ car Emperor grapes from Texas Produce Company, Dallas, Texas, November 15, 1944; $\frac{1}{2}$ car Emperor grapes from Heggblade-Margules Co., billed by Southwest Brokerage Company, November 20, 1944. Only the October 24, 1944, purchase from Heggblade was U. S. Number 1 Emperors; all the rest were unclassified grapes.

Interrogatory Number Nineteen

Q. What prices did you pay for the grapes that you were able to replace?

A. Paid \$3,865.00 for the car from Heggblade-Margules Co., and \$4.15 f.o.b. for the grapes from Western Fruit Growers. \$3.25 per lug, exclusive of freight and pre-cooling for the $\frac{1}{2}$ car from Texas Produce Company; \$3.50 per lug, f.o.b.—\$4.023 per lug delivered for the $\frac{1}{2}$ car, 585 lugs from Heggblade-Margules Co., billed by Southwest Brokerage Company.

Interrogatory Number Twenty

Q. Based on your experience in the produce business, state if you know what the prevailing market price for U. S. Number 1 grapes was on or

Plaintiffs' Exhibit No. 4—(Continued)

about December 10, 1944, and the period subsequent thereto and prior thereto after October 3, 1944.

A. Yes, I know what the prevailing market price for U. S. Number 1 grapes and U. S. Number 1 Emperor grapes was during the period asked in the question at Dallas, Texas, and in California. The prevailing market price quoted was between \$4.00 and \$4.50 per lug, but it was difficult to obtain confirmation even at those prices as the prices kept going up and the demand was great. The price of \$4.00 to \$4.50 per lug was the market price on December 10, 1944, in California and likewise at Exeter, California.

Interrogatory Number Twenty-two

Q. State whether or not you were able to actually buy ten cars of grapes even at the prices quoted on U. S. Number 1 Emperors.

A. I was not able to actually buy ten cars of grapes even at the prices quoted on U. S. Number 1 Emperors.

Interrogatory Number Twenty-four

Q. State whether or not you were able to get any confirmation of sales from any shippers for the Number 1 grapes.

A. I was only able to get confirmation and purchase the grapes that I actually purchased as I testified to before, as answered to question eighteen.

Interrogatory Number Twenty-five

Q. What are the facts as to who first contacted

Plaintiffs' Exhibit No. 4—(Continued)

you with reference to the purchase of U. S. Number 1 Emperor grapes involved in this law suit?

A. Jay Margules of Southwest Brokerage Company contacted me with a wire from Associated Fruit Distributors.

Interrogatory Number Twenty-six

Q. Did you solicit originally Associated Fruit Distributors of California to procure grapes for you? A. I did not.

Interrogatory Number Twenty-seven

Q. What brokers did you contact to attempt to procure replacement cars of grapes when the ten cars were not delivered by the defendants in this suit?

A. Jay Margules, Southwest Brokerage Company, Bill Taylor, Roy Wright and Vance Smith.

Interrogatory Number Thirty-three

Q. Had the ten cars of grapes been delivered, of which you were to receive four, please state whether or not there was a ready market for the resale of the grapes in your trade territory.

A. Yes, the demand was great.

Interrogatory Number Thirty-four

Q. If you have answered the foregoing interrogative in the affirmative, that there was, please state what the prevailing market resale price was in Dallas, Dallas County, Texas, and Fort Worth, Tarrant County, Texas, and the adjoining trade territory.

Plaintiffs' Exhibit No. 4—(Continued)

A. On December 10, 1944, the prevailing market price for Emperor grapes in California and at Dallas, Texas, was between \$4.00 and \$4.50 per lug, and the prevailing resale price in Dallas and Fort Worth, Texas, was from \$5.00 to \$5.50 per lug.

[Interrogatories]:

Respectfully submitted,

/s/ J. MANUEL HOPPENSTEIN,

/s/ HARRY PINES,

Attorneys for Complainant.

[Answers]:

/s/ JOE MOSESMAN,

Witness.

Subscribed and sworn to before me, by Joe Mosesman, on this 29th day of November, 1949.

[Seal] /s/ OLLIE S. REILLY,

Notary Public,

Dallas County, Texas.

[Certified.]

Plaintiffs' Exhibit No. 4—(Continued)

[Title of District Court and Cause.]

CROSS-INTERROGATORIES PROPOSED BY
RAYMOND M. CRANE TO BE PRO-
POUNDED TO THE WITNESS JOE
MOESMAN

Cross-Interrogatory Number One

Q. If your answer to direct interrogatory number eleven is in the affirmative, will you then attach to the deposition a written statement of assets and liabilities of the West Texas Produce Company as of October 3, 1944, and as of December 10, 1944.

A. I do not have a copy of the written statement of the assets and liabilities, but I will try to get one and attach to the deposition as close to those dates as possible.

(Reporter's Note: The sheets attached hereto, marked Exhibit "A," were supplied by the witness to be attached to his deposition, same being furnished after the taking of his deposition, but before transcript of his answers was completed.)

Cross-Interrogatory Number Two

Q. If your answer to direct interrogatory number thirteen is in the affirmative, will you then produce and attach to the deposition a bank statement or ledger sheet furnished you by the bank, showing amount of money on deposit in said bank in your account, also furnish a written statement of assets

Plaintiffs' Exhibit No. 4—(Continued)
and liabilities as of October 3, 1944, and December 10, 1944.

A. I will get these statements as close to those dates as possible and attach them and deliver them to the person taking my deposition. There was no substantial change in the financial statements during these months.

Cross-Interrogatory Number Three

Q. If your answer to direct interrogatory number eighteen is to the effect that you were able to purchase cars of grapes in replacement of the cars which were not sent to you by the respondents in this action, will you produce and attach to your deposition the original or photostatic copies of the invoices received on said cars.

A. Yes, I will try to do so and deliver them to the person taking the deposition to be attached, if I can locate them. I believe the originals were introduced at the hearing in Los Angeles.

Cross-Interrogatory Number Four

Q. In connection with the purchase by Central Fruit and Vegetable Company of four cars of grapes, did you, on behalf of Central Fruit and Vegetable Company, agree to, or were you to, pay Raymond M. Crane, or the Associated Fruit Distributors of California, the sum of \$1000.00 per car, to be transmitted by said Crane or Associated Fruit Distributors to Red Lion Packing Company or John C. Kazanjian, as a part payment on the purchase price of each of said cars?

A. It was my understanding and agreement that

Plaintiffs' Exhibit No. 4—(Continued)

a deposit of One Thousand Dollars per car grapes be paid to Associated Fruit Distributors and Red Lion Packing Company, or John C. Kazanjian, upon furnishing of government inspection reports.

Cross-Interrogatory Number Five

Q. If your answer to the foregoing cross-interrogatory is in the negative, then state whether or not in the testimony which you gave on February 19, 1946, before Raymond L. Dillman, Examiner appointed in the above-entitled proceeding, you stated or testified in substance that you agreed to pay said Crane or Associated Fruit Distributors \$1000.00 for each car of grapes and that they were to transmit same to Red Lion or Kazanjian.

A. I do not remember, but it is likely that I so stated. I do not deny, I may have so testified.

Cross-Interrogatory Number Six

Q. In connection with the purchase by Central Fruit and Vegetable Company of four cars of grapes, did you regard or consider Crane or Associated Fruit Distributors as acting for you?

A. I will have to explain my answer to this question. I consider Crane or Associated Fruit Distributors as a seller and that he was also acting for the shipper, Red Lion or Mr. Kazanjian, and that I was to pay Crane or Associated Fruit Distributors Fifty Dollars a car for consummating the purchase as he was making grapes available to us. I consider him as acting in a dual capacity, as a seller and as a procurer for me.

Plaintiffs' Exhibit No. 4—(Continued)

Cross-Interrogatory Number Seven

Q. If your answer to the foregoing cross-interrogatory is in the negative, then state whether or not in the testimony which you gave on February 19, 1946, before Raymond L. Dillman, Examiner appointed in the above-entitled proceeding, you stated or testified in substance that you regarded Crane as acting for you.

A. I do not remember, but it is likely that I so stated, but I do remember that I wanted to explain and did explain my answer to the examiner, Mr. Dillman. I am not a lawyer and have seldom been in court and merely want to state what the facts actually are. I expected Mr. Crane or Associated Fruit Distributors to see to it that the grapes purchased and which Crane confirmed being sold would be delivered.

Cross-Interrogatory Number Eight

Q. In connection with the purchase by Central Fruit and Vegetable Company of four cars of grapes, did you agree to, or were you going to, pay Crane or Associated Fruit Distributors \$50.00 a car for procuring or buying said four cars of grapes for your account?

A. I cannot answer the question as framed or put by you as it is assuming certain facts and conclusions. The memorandum sales agreement speaks for itself. I did agree that Fifty Dollars a car would be paid to Crane or Associated Fruit Distributors.

Plaintiffs' Exhibit No. 4—(Continued)

Cross-Interrogatory Number Nine

Q. If you answered the foregoing cross-interrogatory in the negative, then state whether or not in the testimony which you gave on February 19, 1946, before Raymond L. Dillman, Examiner appointed in the above-entitled proceeding, you stated or testified in substance that you agreed to or were going to pay said Crane or Associated Fruit Distributors \$50.00 a car for procuring or buying four cars of grapes for your account.

A. I do not remember exactly my testimony, but I do recall explaining my answer and understanding of the questions asked me at the time to the examiner, Mr. Dillman, and it is likely that I so testified as to the payment of Fifty Dollars a car. I do not admit nor deny the testimony as recorded given before the examiner.

Cross-Interrogatory Number Ten

Q. In connection with the purchase by Central Fruit and Vegetable Company of four cars of grapes, did you consider Crane or Associated Fruit Distributors your agent to get the grapes for you?

A. I cannot answer your question as I do not know what you mean by "agent" as I am not a lawyer. Crane or Associated Fruit Distributors were not on my payroll and were not my employees. They offered the grapes for sale and wired that confirmation was obtained. I agreed that Crane or Associated Fruit Distributors would receive Fifty Dollars per car. I am not legally qualified to state

Plaintiffs' Exhibit No. 4—(Continued)

what legal relationship based on these facts amounted to in law.

Cross-Interrogatory Number Eleven

Q. If you answered the foregoing cross-interrogatory in the negative, then state whether or not in the testimony which you gave on February 19, 1946, before Raymond L. Dillman, Examiner appointed in the above-entitled proceeding, you stated or testified in substance that you considered Crane your agent to get these grapes for you.

A. I do not recall all the testimony given the examiner. It is likely that I so testified, explaining my answer to the examiner based on my understanding of questions asked me, and I do not deny whatever is found in the Statement of Facts.

[Answers]:

/s/ JOE MOSESMAN,

Witness.

Subscribed and sworn to, before me, by Joe Mosesman, on this, the 29th day of November, 1949.

[Seal] /s/ OLLIE S. REILLY,

Notary Public, Dallas County,
Texas, Reporter.

[Cross-Interrogatories]:

.....,

Attorney for Raymond M.
Crane, dba Associated Fruit
Distributors.

Plaintiffs' Exhibit No. 4—(Continued)

The State of Texas,
County of Dallas—ss.

I, Ollie S. Reilly, a Notary Public in and for Dallas County, Texas, do hereby certify that the foregoing answers of Joe Mosesman, the witness before named, were signed and sworn to by the said witness before me.

Given under my hand and seal of office, this the 29th day of November, 1949.

[Seal] /s/ OLLIE S. REILLY,
Notary Public, Dallas County,
Texas.

Received in evidence July 11, 1950.

PLAINTIFFS' EXHIBIT No. 5

Before the Secretary of Agriculture
PACA Docket No. 4589

In re:

CENTRAL FRUIT & VEGETABLE COMPANY
AND WEST TEXAS PRODUCE COMPANY

vs.

ASSOCIATED FRUIT DISTRIBUTORS OF
CALIFORNIA and RED LION PACKING
COMPANY.

Wednesday, February 19, 1947

PROCEEDINGS

Examiner Griffin: There is set for hearing at this time and place the matter of Central Fruit & Vegetable Company and West Texas Produce Company versus Associated Fruit Distributors of California and Red Lion Packing Company. [2*]

* * *

Mr. Hoppenstein: I would like to call Mr. John Kazanjian.

For the purpose of the record, we would like to show that we are calling one of the respondents, Mr. Kazanjian, as an adverse witness, and are not to be bound by his testimony. [4]

JOHN C. KAZANJIAN,

a witness called on behalf of the complainants, having been first duly sworn, was examined and testified as follows:

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

Plaintiffs' Exhibit No. 5—(Continued)
(Testimony of John C. Kazanjian.)

Direct Examination

By Mr. Hoppenstein:

Q. State your name, please.

A. John C. Kazanjian.

* * *

Q. Do you hold a license from the Department of Agriculture? A. Yes.

Q. Do you recall around October—a little prior thereto, having 15 cars of U. S. No. 1 grapes available for sale in interstate commerce?

A. Yes. [5]

* * *

Q. (By Mr. Hoppenstein): As I understand it, you had 15 cars of U. S. No. 1 [6] Emperor grapes that you were offering for sale, is that correct?

A. I had a lot more than 15 cars.

Q. Directing your attention to a particular group of 15 cars, when did you first contact Mr. Crane concerning those cars?

A. Oh, I think we talked that over with Crane—my guess would be about three or four weeks previous to October 3rd.

Q. And at that time what was your conversation with Mr. Crane?

A. He asked me if I was going to put any grapes in storage. Storage was at a premium at that time. Storage space was hard to find, and he told me he had storage available, if I was interested in putting some in storage, and I told

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of John C. Kazanjian.)

him to let me know if he could work out a storage deal. [7]

* * *

Q. What did you tell Mr. Crane, and what did he tell you, concerning those cars of grapes being placed in storage?

A. Exactly what I said. He asked me if I was going to put any in storage, if I would be interested in a storage deal, and he said he thought he could get some storage space, and I told him to let me know if he could, and see what we could work out.

Q. Did you quote any price to him?

A. The price was already set by the ceiling.

Q. Sir?

A. The ceiling, I said, already set the price. It wasn't a matter of price. There was a ceiling set on it. We had a ceiling to operate under, and the ceiling was always the price.

Q. Did you have any discussion or conversation with him concerning the transferring of title to 15 cars of U. S. No. 1 grapes about December, 1944, at a fixed price of \$2.50 per lug to you?

A. At that time I don't think we ever went into that [8] much detail. It was just like I said: He asked me if I was going to go into storage, or was interested in a storage deal, and I said, yes, and he was going to let me know if he could find the storage, and then, later on, we had several telephone conversations, in which he told me that he

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of John C. Kazanjian.)

had located storage, and that he had the buyers that would be willing to guarantee the price and assume the risk of storage, and pay for the grapes. Of course, it was different from this wire which I got eventually; the terms and the amounts were different. But, we had several telephone conversations. Mr. Crane called me up about every day, and then his representative, Mr. Hoover, used to come up there and call on me quite regularly.

Q. You knew that Mr. Crane, doing business as Associated Fruit Distributors of California, was offering these grapes for sale in interstate commerce, did you not?

* * *

The Witness: I never know what Crane is doing,—that is his business—no more than he knows what I am doing over there at my end of the deal.

Q. (By Mr. Hoppenstein): Was it agreeable to you for Mr. Crane to proceed to [9] offer the 15 cars of U. S. No. 1 grapes for sale?

A. I couldn't stop Crane from doing anything. But, I mean, I didn't agree to anything. Crane could have gone ahead and agreed to give those grapes away. He had no authorization, either in verbal or writing, from me, to make any definite offer. He was supposed to come to me with a proposition, and see if it was agreeable to me. I mean, I haven't given him any authority to go ahead and quote it, under any conditions.

* * *

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of John C. Kazanjian.)

Q. You knew that they were being offered on the basis of \$1,000.00 per car deposit by buyers, with the buyers making a \$50.00 charge for storage, did you not?

A. I didn't know what Crane was—Crane was to make the deal, and then come to me and find out if the deal was satisfactory to me. I hadn't told Crane what kind of a deal to offer. Crane was supposed to work out a deal, and come to me and find out if I would want the deal. So, I don't know what he was offering until—this is the first information I have from him what he has been able to work out (indicating).

Q. Did Crane ever advise you that he had made a deal of 10 cars of U. S. No. 1 grapes at a price of \$2.50 per lug [10] net to you, to Central Fruit & Vegetable Company of Dallas and West Texas Produce Company?

* * *

The Witness: No, he did not.

Q. (By Mr. Hoppenstein): He never had a telephone conversation with you, advising of any such sale?

A. Never mentioned any parties.

Q. Did he tell you that he had any sale, without mentioning the names of parties?

A. This wire here was the first reference to it.

Q. Was it the only time?

A. That I remember.

Plaintiffs' Exhibit No. 5—(Continued)
(Testimony of John C. Kazanjian.)

Q. Did he have any telephone conversation with you prior [11] to your receiving that wire?

A. He had, I imagine, to the effect that he was trying to work out a storage deal, and he thought it would be satisfactory.

Q. And he never advised you by telephone that he had confirmed 10 cars of grapes to Central Fruit & Vegetable and West Texas Produce Company?

A. In all our dealings, he never tells me who he is dealing with. I never know who he sells to. I get my checks through him.

Q. State whether or not on October 3, 1944, you received a telegram from Associated Fruit Distributors of California, addressed to you at Exeter, California, as follows:

“Referring Telephone Have Sold for Your Account Basis 2.50 Lug Net to You Block Emperors Mentioned Five Cars Basis 750.00 Car Deposit Ten Cars Basis 1,000.00 Deposit to Be Paid Upon Receipt US One Government Inspections Now Depending You Handle Through Us Balance Cars You Mentioned for Fresh Shipment Advise When Expect Ship These Believe We Could Place Them Now Ceiling Priedxxx Price with Deposits Selling Basis Ability Makes US One Grade Suggest Give Us Approximate Shipping Dates Mays Well Get Cleaned Up Since Ceiling Precludes Any Possibility Higher Market Time of Shipment Will Forward Confirmations for Your Signature Soons Receive Airmail From Buyers.” [12]

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of John C. Kazanjian.)

Signed, "Associated Fruit Distributors of California."

Did you receive such a wire? A. Yes, I did.

Q. Then I will ask you whether or not, about October 4, 1944, you sent a wire to Associated Fruit Distributors:

"Fifteen Cars Storage U S One Emperors December Tenth Conversion Satisfactory at Two Dollars and Fifty Cents FOB Exeter Guaranty by Buyer. One Thousand Dollars Deposit on 10 Cars and Seven Hundred Fifty Dollars on Five Cars Said Deposit to Be paid Immediately on Inspection at Shipping Point. You to Arrange for Storage as Agreed. Balance of Pack Intend to Load After Oct Twentieth Will Be Glad to Make Deal on Same About the 15th of Oct.

"JOHN C. KAZANJIAN"

Did you send such a wire? A. Yes, I did.

* * *

Q. And you signed it yourself? A. Yes.

Q. Sent it through Western Union?

A. Yes. [13]

Q. And, in sending that wire, it was your intention that Mr. Crane could rely on it, wasn't it?

A. Rely on my wire. Now, the interpretation of my wire is another question.

Plaintiffs' Exhibit No. 5—(Continued)
(Testimony of John C. Kazanjian.)

Q. But you sent the wire, and you intended for Mr. Crane to rely on it, didn't you?

A. I wouldn't spend the money to send it if I didn't. I wouldn't have sent it.

Q. And you would intend that the buyers dealing with Mr. Crane would rely on your wire, wouldn't you?

A. This was strictly between Mr. Crane and myself.

Q. You knew that Mr. Crane was dealing with—— [14]

* * *

Q. You knew that it was customary in the trade for Associated Fruit Distributors to then contact buyers in reliance of the information that you furnished Mr. Crane, did you not? [15]

* * *

Examiner Griffin: I think, if the witness will recall the question, it was whether or not you thought, on the basis of usage and custom, that Mr. Crane would, in reliance on your wire, make dealings with other parties.

The Witness: Yes, on my wire, on my October 4th wire.

Q. (By Mr. Hoppenstein): Now, Mr. Crane's wire to you says:

“Referring Telephone Have Sold for Your Account Basis 2.50 Lug Net to You”——

In your wire to him you did not inform him that

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of John C. Kazanjian.)

that sale was not satisfactory, did you, Mr. [18] Kazanjian?

* * *

The Witness: Yes, I think I did. I think that was the implication of my wire.

Q. (By Mr. Hoppenstein): Will you refer to the photostatic copy of your wire, and point out any word similar to "rejection" or "not satisfactory"?

A. Yes.

Q. All right.

A. In our telephone conversations on the storage deal, one of the main things that I had insisted on was cash payment in Exeter.

Mr. Hoppenstein: I don't think the answer is responsive.

Mr. Aynesworth: I submit he is answering the question.

Examiner Griffin: He asked you if, in the wire, there was anything that indicated your rejection.

The Witness: Yes, I am coming to that.

Examiner Griffin: All right. Proceed.

The Witness: One of the things that he did not secure from me, and which I had insisted on all the time, was cash payment in Exeter of this \$1,000.00, and, another thing I insisted on was that the inspection should be in Exeter, and not out of storage, and he wasn't clear on that.

Then, another thing that he tied in with this deal, he wanted me to give—on the strength of this 15-car storage, which would have made me \$3,500.00 more

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of John C. Kazanjian.)

money—and, after all, [19] Crane had found the storage—on the strength of that he wanted me to handle all my grapes through him.

This might not be as clear if you didn't have the telephone conversation background, but, he made it appear all the time that the only way he could let me have this 15-car deal was if I would promise him, or guarantee to handle all my grapes through him. That is the interpretation I put on this, "Now, depending that you sell rest of the grapes through me," and I wrote back and said I wasn't ready yet to deal on the balance of the grapes. In other words, if he could arrive at a 15-car deal that was satisfactory, without tying in the others, I would be willing to go ahead with the deal.

So, there was three things, there seems to me. My money wasn't being paid in Exeter, the storage wasn't clear, that the buyer was assuming the risk, because there is a lot of risk in storage. Sometimes you go in—like this here, we dumped car after car that stayed in storage and spoiled. The buyer was supposed to assume that risk, and, according to our understanding, the buyer was supposed to pay cash in Exeter, and he wanted to tie in the rest of my grapes on this 15-car storage deal, which I objected to in this answer to him, and it seemed to me that—and I didn't feel that he had the kind of deal that would be satisfactory to me.

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of John C. Kazanjian.)

Q. (By Mr. Hoppenstein): I will ask you this question: [20]

Were these grapes, 15 cars intended by you to be sold to Associated, or intended to be sold by Associated to other buyers?

* * *

The Witness: They were not sold at all, to start with. We were trying to negotiate a deal that never went through, so I don't understand what you mean.

Q. (By Mr. Hoppenstein): In your negotiations with Mr. Crane for the sale of grapes raised by you or produced by you, was it your intention, in negotiating for these sales, to sell them to Associated or to buyers that Associated would find? [21]

* * *

The Witness: Well, the only answer to that is the business I did with him the previous year. He used to come over—he had a representative there. I sold him quite a few cars the year before, and they always paid me by check, and I don't know whether he kept those grapes, speculated on them, sold them himself, or was buying them for storage. I don't know his connections.

Q. (By Mr. Hoppenstein): In your dealings with these 15 cars of grapes, was it your intention to sell them outright to Associated, or to buyers that Associated would find?

* * *

The Witness: Now, wait a minute. Do I under-

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of John C. Kazanjian.)

stand that [22] right? You mean, was my intention—I mean, in my mind was I selling to Crane, Ray Crane, or was I dealing with Ray Crane with the understanding that he was negotiating for some other parties?

Mr. Hoppenstein: That is right.

The Witness: I couldn't give you a fair answer to that, because he could have done either one, and I wasn't connected.

Q. (By Mr. Hoppenstein): What was your intention in the matter?

A. There was no intention, and there was no information, as far as I was concerned. It didn't make any difference to me, just so I got my terms. If I could get my terms, Crane could handle his business any way he pleased.

Examiner Griffin: If I might interrupt, I would like to ask the witness a question.

Would you look to Mr. Crane for payment of these grapes?

The Witness: No.

Examiner Griffin: If anything happened to the grapes, would you look to Mr. Crane for payment on them?

The Witness: You mean, the deposit, the original \$1,000.00 deposit?

Examiner Griffin: No, I mean for payment. Say the grapes were lost or spoiled or destroyed, or something, would you look to Mr. Crane for payment for them?

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of John C. Kazanjian.)

The Witness: No, I guess not. I don't quite get the [23] question, your Honor. I don't get the question.

Examiner Griffin: I just want to know whether you would look for payment from Mr. Crane for the grapes on this transaction?

The Witness: If the grapes—I mean, would I expect to——

Examiner Griffin: If they went into storage, or were spoiled or something else happened to them, would you look to Mr. Crane for payment for them?

The Witness: Well, I never thought of it. I figured I was protected if I could get the \$1,000.00, and then, if there was some damage, I could sacrifice \$1,000.00 and still sell what was in storage, and come out.

Examiner Griffin: But, in case Mr. Crane were not successful in getting a commitment like that, would you look to him for payment of the grapes?

Mr. Wackerbarth: I am going to say one thing, that I think the Commissioner's question calls for a conclusion of the witness. It is immaterial whether he was going to look to Crane or not. I object to the question.

The Witness: My honest answer to that would be that at the time it never occurred to me. What I would say now would be just my conclusion now. At that time that never occurred to me, your Honor, in any way.

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of John C. Kazanjian.)

Examiner Griffin: All right. You may [24] proceed.

Q. (By Mr. Hoppenstein): Mr. Kazanjian, you never delivered 10 cars of grapes or obtained inspection for the delivery of 10 cars of U. S. No. 1 grapes to be placed in storage with government U. S. 1 certificates, did you?

A. I didn't put any grapes in storage.

Q. And you didn't deliver 10 cars of grapes to the complainants in this proceeding, did you?

A. No.

Q. State whether or not, about the middle of October, 1944, you advised Mr. Crane that you would not carry out the agreement to deliver 10 cars of grapes to West Texas Produce Company and Central Fruit & Vegetable? [25]

* * *

The Witness: Your Honor, it was about October 6th or 7th, and not on that other date that was given, that we have [26] had—well, the day after this October 4th wire, I spoke to Crane on the telephone, and he was to have his representative come up and iron out the difficulties, so it was clear to Mr. Crane on October the 5th, the day after this wire, that I didn't consider a deal made, and that he was to have his representative come up and iron out the difficulties involved, which difficulties were never ironed out. So, it was long before that October 19th that they had notice that I did not consider a deal ever having been arrived at.

* * *

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of John C. Kazanjian.)

Q. I will ask you this question:

What difficulty are you talking about?

A. The difference in the terms that he offered and the terms that I insisted on, are the difficulties I am talking about.

Q. When did you first learn that Associated had confirmed the sale of 10 cars of U. S. No. 1 grapes for your account to the complainants in this [27] proceeding?

A. I don't know when I learned. I don't know that he ever told me that he had anything definite; he said he was negotiating for some deal, but I never did know that there was ever any deal consummated, as far as I was concerned, anyway, or as far as he was concerned, for that matter.

Q. Isn't it a fact that you received a wire from the Southwest Brokerage Company, direct to you, about October 13, 1944, concerning 10 cars of U. S. No. 1 grapes, confirmed to West Texas Produce and Central Fruit & Vegetable?

* * *

Examiner Griffin: I think the witness is entitled to see the telegram before he answers the question.

Q. (By Mr. Hoppenstein): I show you a photostatic copy of a telegram marked Exhibit 13-Q, attached to the report made by Mr. T. C. Curry, dated April 3, 1946, on the investigation of this matter, and ask you if you received such a wire? [28]

* * *

Plaintiffs' Exhibit No. 5—(Continued)
(Testimony of John C. Kazanjian.)

The Witness: I don't recall it, but I must have received it. I don't remember receiving it. I don't recall that wire.

Q. (By Mr. Hoppenstein): So that at the time you knew that West Texas Produce and Central Fruit & Vegetable were claiming 10 cars of U. S. No. 1 grapes under an agreement, did you not?

A. I don't recall the wire, but I must have received it, I assume.

Q. I will ask you whether or not, around that same time, you had any conversation or dealings with Mr. Crane to obtain an offer from the West Texas Produce and Central Fruit & Vegetable Company to pay you \$3.00 net per lug in lieu of [29] \$2.50?

* * *

The Witness: Well, Crane handled all of my grapes that year, and he handled, I imagine 60 cars of grapes after these dates, and we had all kinds of offers and counter-offers and sales, so this could have been part of the usual business transaction. I don't recall the details. That happened three years ago.

Q. (By Mr. Hoppenstein): Isn't it a fact, then, around October 11, 12 and 13 of 1944, you knew that the complainants in this proceeding were claiming the right to buy, under an agreement from you, 10 cars of U. S. No. 1 grapes? [30]

* * *

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of John C. Kazanjian.)

The Witness: I am aware of the fact that at that date some people claimed that they had a deal for some grapes.

Q. (By Mr. Hoppenstein): And you advised Mr. Crane that you would refuse to ship to them under the terms of the contract that they [32] claimed?

* * *

The Witness: On October 5th, Mr. Crane knew that he felt and I felt that we hadn't arrived at a contract yet, as evidenced by our wires and subsequent telephone conversations.

Q. (By Mr. Hoppenstein): Even after that, you still refused to make shipment, didn't you?

A. My position never did change, from October 4th on to this day. That includes all dates.

Q. You were familiar with the prevailing market prices for U. S. No. 1 grapes around December 10, 1944, were you not? A. Yes, I was.

Q. What, in your opinion, was the prevailing market price? [33]

* * *

The Witness: You asked me if I knew at that time what the market was. Yes, I did know at that time, but I would be honest with you if I was to say now it would be guesswork. I think it was in the neighborhood—it depended on the brand, and it depended on the condition of the grapes. It fluctuated, I think, between—oh, I would say three and a half to four, four and a half, it might have been for some

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of John C. Kazanjian.)

of the highest, the very best brands. That is my recollection of it.

Q. (By Mr. Hoppenstein): Directing your attention to the period between October 4, 1944, and October 10, 1944, what would you say was the prevailing market price for U. S. No. 1 Emperor grapes? A. \$3.75.

Q. Isn't it a fact that grapes were quite scarce, and difficult to obtain for replacement during the period from October 10th to December 10th, and thereafter?

A. No. We had a bumper crop that year. There was a lot of grapes. The only thing was, of course, there wasn't a shortage of grapes. There was an abnormal demand, maybe, on the other end, but we had an abnormal crop of grapes.

Q. Isn't it a fact that the obtaining of confirmation for 10 cars of grapes of U. S. No. 1 grade during that period would be rather difficult? [34]

A. No, I would say that time there must have been at least 1,500 cars in storage, 2,000 cars in storage.

Q. Wasn't it the general attitude of shippers not to sell, however, and to hold the grapes for higher prices?

A. It might have been. There was always some sold. I don't know.

* * *

Q. I will ask you whether or not these photostatic [35] copies of the telegrams attached to Mr.

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of John C. Kazanjian.)

Crane's deposition are true and correct copies of the telegrams that you received and that you sent?

A. Yes, they are.

Mr. Hoppenstein: At this time we would like to offer the deposition of Mr. Crane in evidence, depending on the attitude of the Examiner, as to whether or not you want it submitted in question and answer form, or in toto. We are offering it [36] in toto.

* * *

Examiner Griffin: If there are no [37] objections, the deposition will be admitted, together with the attachments.

Mr. Aynesworth: We waive the reading of it. It may be considered read.

Examiner Griffin: Let us mark the deposition of Mr. Crane as Complainant's Exhibit No. 1, and it will be received.

(The deposition referred to was marked Complainant's Exhibit 1 and was received in [38] evidence.)

* * *

Cross-Examination

By Mr. Wackerbarth:

Q. Mr. Kazanjian, did you call Mr. Crane on the morning of the 5th of October, after you sent him this wire?

A. No. Mr. Crane called me up.

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of John C. Kazanjian.)

Q. I think you have stated that you used the date of October 5th? A. Yes.

Q. Didn't you testify that you were aware that someone did claim a right to buy grapes, and that, "On October 5th, Mr. Crane knew how I felt, that we had not arrived at a contract"?

You say that Mr. Crane knew how you felt. Did you express yourself to Mr. Crane in that regard?

A. Yes, I did.

Q. Was that by a telephone conversation?

A. Yes, it was in regard to this wire that I sent, and we discussed the terms that I had laid down in this return wire of mine.

Q. Had the ceiling gone off the grapes at that time? [40] A. No.

Q. Do you know when the ceiling did go off?

A. Oh, about three days or so, I think, after that.

Q. After which?

A. After—I think the ceiling went off about the 7th or 8th, because I recall in that telephone conversation the day following this wire, he said he would have Mr. Hoover come and straighten things out, iron it out, and arrive at a satisfactory deal. Mr. Hoover arrived about two days after that telephone conversation. By that time the ceilings had come off.

Q. Do you remember whether the ceilings went off on the 8th or the 9th, definitely?

A. I don't recall the definite date, but I know Mr. Hoover got there one day after the ceiling was off. The last conversation we had was with Mr.

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of John C. Kazanjian.)

Crane. Hoover was supposed to come and iron out the deal.

Q. In connection with this 10 cars of grapes, did you pay Mr. Crane a commission for selling [41] these?

* * *

The Witness: No. Naturally you don't pay on something you don't sell.

* * *

Q. Did you have a written contract of any kind with Mr. Crane? A. No.

Q. Did any other telegrams pass between you and Mr. Crane, other than the two telegrams which are attached to Mr. Crane's deposition, regarding this transaction?

A. No, I don't think so. I don't recall any.

Q. Did you ever send Mr. Crane a telegram rejecting the terms set forth in your telegram of October 4th?

A. Rejecting the terms of my own telegram, you say?

Q. Your own telegram, yes.

A. No, I never recall sending him any telegram rejecting my own terms of October 4th.

Q. Did you ever send him any letter or any written communication of any character? [42]

A. I don't recall.

Q. Modifying or rejecting those terms?

A. I don't recall.

Q. And the only transactions between you and

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of John C. Kazanjian.)

Mr. Crane, after the telegram of October 4th, were telephone conversations?

A. Plus conversations with his representative, Mr. Hoover, who—he used to visit me at least three or four times a week, and he was representing Crane in this transaction. He did see me almost every day, and then, about every two or three days, he and I would talk on the telephone.

Q. Mr. Kazanjian, directing your attention to this telegram of October 3rd, from Associated to you, it says:

“Referring Telephone Have Sold for Your Account Basis 2.50 Lug Net,” and so forth.

You did receive that on the 3rd, didn't you?

A. Yes, I did.

Q. And you didn't send him any telegram or letter repudiating that statement in there, did you?

A. On October 4th, I did, yes.

Q. That is the only telegram that you sent?

A. Yes, that's right.

Q. But you didn't send him anything other than that October 4th telegram? A. No. [43]

Q. You had discussed this matter from time to time with Mr. Crane before you received this telegram of October 3rd, hadn't you?

A. That's right.

Q. And in the course of the discussions, you did know that Mr. Crane was contacting other people with reference to his grapes, didn't you?

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of John C. Kazanjian.)

A. Did you say contacting, or contracting?

Q. Contacting.

A. Yes, I knew he was contacting, and he gave security that was satisfactory to me.

Q. And it was agreeable to you, was it not, that Mr. Crane contact various brokers or purchasers?

A. He was supposed to try and secure me a 15-car deal under the terms that I had discussed with him. Naturally he would have to contact some people, I assume, to make some kind of a deal.

Q. And it was agreeable to you that he did contact them, was it not?

A. Yes, it was agreeable to me to go into a 15-car deal with the terms specified, those three items that I mentioned.

Q. On five of the cars, you understood that you were to get a deposit of \$750.00?

A. I think he called up and said that he had some kind [44] of a deal pending where they objected to a \$1,000.00 deposit. They wanted to make a \$750.00 deposit, and I told him if the deposit was made in Exeter before the cars left my possession in Exeter, that the \$250.00 did not materially matter.

Q. Mr. Kazanjian, you understood that Mr. Crane—and Mr. Crane told you, didn't he, on October 3rd—that he was working on two deals, one a group of five cars, upon which a deposit of \$750.00 was to be made, and the other a group of ten cars,

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of John C. Kazanjian.)

upon which a deposit of \$1,000.00 a car was to be made? A. That's right.

Q. And you knew then that there were two different deals that he was working on?

A. That's right.

Q. And that was not objectionable to you, that the 15 cars be handled in two separate deals, was it?

A. That's right, it didn't make any difference.

Q. It was not objectionable?

A. It didn't make any difference.

Q. And, in his telegram to you of the 3rd, he mentioned that these deposits were to be paid upon receipt of U. S. 1 government inspections. You understood what that meant, didn't you, when you received this wire of October 3rd?

A. Yes, I thought I did. That would be a matter of interpretation. I think I understood clearly what was meant. [45]

Q. What did you understand that to mean?

A. I understood that to mean——

Q. That is, what did you understand at that time that that meant?

A. At that time I understood that to mean that you would take the U. S. 1 inspection on your grapes, and mail your U. S. 1 inspection to some unknown party in the east, and then wait for payment to come, and, the deal that I had insisted on, and the way I had been dealing the previous year on every car I sold, money was deposited in the Exeter bank. When I took my inspection, I took

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of John C. Kazanjian.)

it right to the bank, and the money was paid over to me by the buyers.

Q. Were you through, Mr. Kazanjian?

A. Yes.

Q. I want to call your attention to these words:

“Deposit * * * to Be Paid Upon Receipt
U. S. One Government Inspections.”

Who did you understand was to receive those government inspections as the basis of the payment of \$1,000.00?

A. I assumed whoever it was that he was dealing with, negotiating with, trying to make a deal with, some parties who were unknown to me.

Q. Then it was your understanding that this receipt of U. S. government inspections meant the receipt by the purchaser, is that correct? [46]

A. By the purchaser, whoever was purchasing them.

Q. And then, when this purchaser received this inspection, that he would then pay the \$1,000.00, is that correct?

A. That's right.

Mr. Wackerbarth: I think that is all.

* * *

Cross-Examination

By Mr. Moradian:

Q. Did you have any control or direction over what Mr. Crane of the Associated Distributors did or acted or negotiated?

A. Absolutely not.

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of John C. Kazanjian.)

Q. And in this particular deal there was no agreement on your part to pay any commission whatsoever to Mr. Crane, is that correct?

A. No. [47]

* * *

Examiner Griffin: The investigation report and the attachments thereto will be admitted as Exhibit No. 2.

(The investigation report and attachments referred to were marked Complainant's Exhibit 2 and received in evidence.)

Examiner Griffin: The complaint, together with attachments thereto, will be admitted as Exhibit No. 3.

(The complaint and attachments referred to were marked Complainant's Exhibit 3 and received in evidence.) [54]

* * *

Q. (By Mr. Moradian): Mr. Kazanjian, I will show you this document which is headed "Standard Memorandum of Sale." It is signed by Jay Margules, and it purports to be a memorandum of the sale of 10 cars of U. S. No. 1 Emperor grapes to West Texas Produce Company, Fort Worth, and Central Fruit & Produce, Dallas, and so forth.

I will ask you if, before the commencement of these proceedings, you ever saw the original of that, or a copy of it? A. No.

Q. Was there any copy ever sent you of this document? A. No.

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of John C. Kazanjian.)

Q. Did you have an opportunity at any time to authorize the execution of this document or the acceptance of this memorandum of sale?

A. No. [55]

Q. Did you know anything about such a contract or such a form of memorandum before these proceedings were instituted? A. No.

* * *

Redirect Examination

By Mr. Hoppenstein:

Q. Mr. Kazanjian, you never furnished U. S. No. 1 inspection certificates to the complainants in this proceeding, did you? A. No.

Q. I believe you testified a moment ago that Mr. Crane finally did handle your entire grape deal during 1944 and 1945, is that correct?

A. I think he handled most of it.

Q. Did you pay him a commission for the handling of that deal?

A. Well, there was a difference between the deal after the ceiling and before the ceiling. Before the ceiling they were operating without any commission of any kind. They were anxious to get the grapes, and they got paid on the other side for procurement, because the demand was so strong for grapes, and the shipper didn't have to pay any sales charge. [56]

After the ceilings went off, it went back to the general practice, where an intermediary or a bro-

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of John C. Kazanjian.)

ker was entitled to his percentage, but the deal was completely different with the ceiling, and off the ceiling. It was completely different.

Q. After the ceiling went off, on the transactions that Mr. Crane handled, you paid him a commission? A. Yes, he got a commission.

* * *

Recross-Examination

By Mr. Moradian:

Q. I will ask you, Mr. Kazanjian, if in this transaction you at any time received the confirmations that were to be forwarded to you by air mail for your signature on this deal?

A. No, absolutely not.

Mr. Moradian: That is all. [57]

* * *

JAMES P. COYN

a witness called on behalf of the complainants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hoppenstein:

Q. Please state your name.

A. James P. Coyn, C-o-y-n.

Q. Mr. Coyn, with whom are you employed?

A. Associated Fruit Distributors of California.

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of James P. Coyn.)

Q. In what capacity?

A. Traffic manager is my title.

Q. What are your duties?

A. Well, general traffic duties in connection with our business, and I also prepare and handle these P. A. C. A. cases.

Q. Are you acquainted with the facts in connection with the 10 cars of U. S. No. 1 Emperor grapes sold to the complainants in this case?

A. I prepared the answer to the complaint.

Q. Did you have anything to do with the negotiations for the sale of the grapes?

A. No, I did not.

Q. Did you know anything about it in the office? Was it under your supervision?

A. This particular?

Q. Yes. [58] A. No.

Q. Were the records kept under your supervision? A. Yes.

Q. Do you have an office copy of the telegram dated October 2nd, 1944, sent to Southwest Brokerage Company at Dallas? A. Yes, I do.

Q. Is that a true and correct copy of the original telegram sent by Associated to Southwest Brokerage at Dallas in connection with the 10 cars of U. S. No. 1 grapes?

A. The telegram was sent on the Western Union machine, and this is the original of it.

Q. Was that signed by Mr. Crane?

Plaintiffs' Exhibit No. 5—(Continued)
(Testimony of James P. Coyn.)

A. Signed "Associated Fruit Distributors of California."

Q. Do you know who signed it?

A. No, I do not.

Examiner Griffin: If I might interrupt?

By the "Western Union machine," you mean a teletype machine, not a T.W.S. machine?

Q. (By Mr. Hoppenstein): Typed out in your office? A. That's right.

Q. And signed in your office?

A. That's right.

Q. Is that an exact copy of the telegram that is [59] attached to the complaint as an exhibit, No. 1, that has been introduced and offered in evidence?

A. The telegram is a copy of the wire received at Dallas, I believe, rather than a copy of the wire sent, isn't it?

Q. Yes, that is a copy of the wire received.

A. A copy of the wire received at Dallas.

Q. Is the phraseology of the copy of the wire that was received and the wire that was sent, which you have in your office and now hold in your hand, the same as to phraseology? A. That's right.

Mr. Wackerbarth: In other words:

"Secured Red Lion Packing Company Confirmation Ten Cars Grapes as Outlined You Collect Deposits to Be Forwarded to Us Soons DUPJA Wired Each Car."

Is that correct?

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of James P. Coyn.)

The Witness: "DUPJA" is a code word meaning government inspection.

Q. (By Mr. Hoppenstein): And you know that telegram was sent by Associated? A. Yes, sir.

Q. In the regular course of its business?

A. Yes, sir.

Q. Do you know whether or not it would have been sent if Associated had not obtained prior confirmation from Red Lion? [60]

A. I wouldn't be able to answer that, what would have been done.

* * *

Q. (By Mr. Hoppenstein): In the regular course and usual custom of business of Associated, did you send out telegrams from your office advising purchasers that confirmation had been received for a sale when you did not have such confirmation?

A. Oh, no, not in the ordinary course of business, we do not. [61]

* * *

Q. (By Mr. Hoppenstein): Did you ever receive from Red Lion certificates of U. S. No. 1 inspection on 10 cars for the complainants in this proceeding? A. No, we did not.

Q. Do you know whether or not you made repeated demands on Red Lion for those certificates for this particular sale?

A. I don't know that any such demand was ever made.

Plaintiffs' Exhibit No. 5—(Continued)
(Testimony of James P. Coyn.)

Q. That is, to your knowledge?

A. To my knowledge.

Q. Did you ever have any dealings personally with Red Lion in connection with this transaction?

A. No.

Q. Do you know of any other telegrams or letters between Associated and Red Lion in connection with this transaction?

A. No, I do not.

Q. Have you ever seen a copy of the standard memorandum sales agreement of Southwest Brokerage Company, to the complainants?

A. I saw the copy that was attached to the original complaint.

Q. Did you ever see a copy that is in your office files?

A. Yes, I have seen it. [62]

* * *

Q. And this was received by Associated?

A. That's right.

* * *

Q. It was satisfactory with Associated, was it not, for this memorandum of sale to be issued by Southwest Brokerage, selling the 10 cars for the account of Associated Fruit Distributors? [63]

A. I didn't handle the transaction, and therefore I couldn't answer your question.

Q. After you received a copy of this standard memorandum of sale, did you offer any objection to Mr. Margules of the Southwest Brokerage Company?

A. No.

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of James P. Coyn.)

Q. Did the memorandum of sale agreement correctly reflect the agreement between Associated and the Southwest Brokerage Company on behalf of these complainants?

* * *

The Witness: No, I do not know of my own knowledge. [64]

* * *

(The deposition of Jay Margules was marked as Complainants' Exhibit No. 4 and was received in evidence.)

* * *

(The deposition of Harry Bockstein was marked as Complainants' Exhibit No. 5 and was received in evidence.) [66]

* * *

JOE MOSESMAN

a witness called on behalf of the complainants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hoppenstein:

Q. Please state your name.

A. Joe Mosesman, M-o-s-e-s-m-a-n.

Q. Where do you live? A. Dallas.

Q. What firm are you connected with?

A. Central Fruit & Vegetable Company.

Q. One of the complainants in this proceeding?

Plaintiffs' Exhibit No. 5—(Continued)
(Testimony of Joe Mosesman.)

A. That's right.

Q. Are you also present on behalf of the West Texas Produce Company, the other complainant?

A. That's right.

Q. How many years' experience have you had in the fresh fruit and vegetable business?

A. Since 1905.

Q. Are you licensed by the Department?

A. Sir?

Q. Are you licensed by the Department?

A. Yes, sir.

Q. The West Texas Produce Company, to your knowledge, is licensed by the Department? [67]

A. That's right.

Q. Do you recall the transaction involving the purchase of 10 cars of U. S. No. 1 Emperor grapes about October 3, 1944? A. I do.

Q. Did you handle the transaction on behalf of Central Fruit and West Texas Produce Company?

A. Correct.

Q. Please state who first contacted you with reference to——

A. Southwest Brokerage Company.

Q. That is Mr. Margules?

A. Mr. Jay Margules. [68]

* * *

Q. What did Mr. Margules tell you?

A. That he had a wire from the Associated Fruit Company offering all 15 cars U. S. No. 1 grapes at \$2.50 a lug.

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of Joe Mosesman.)

Q. What did you do about that offer from Mr. Margules?

A. I told him the deal is satisfactory, with the amount of deposit that was required.

Q. Did you require that he contact West Texas Produce Company with reference to division of the cars?

A. That's right.

Q. How many cars was West Texas Produce to receive?

A. Well, it was understood about half each.

Q. Didn't you then agree that West Texas would get six cars, and that you would get four?

A. That's right.

* * *

Q. Did you understand the price that you were to pay for the 10 cars of grapes? [69]

A. Yes, sir, it was \$2.50, plus \$3.00 Associated Fruit Company, plus three cents per lug Southwest Brokerage Company.

Q. I hand you a copy of a standard sales agreement from Southwest Brokerage Company to West Texas Produce Company, Fort Worth, and Central Fruit and Produce, Dallas, dated October 4, 1944, and ask you whether or not you received that memorandum of sale agreement?

A. That's right.

Q. Did you agree to the terms set out in that memorandum of sale agreement?

A. Correct.

Q. The name, Central Fruit and Produce as listed on this memorandum, is that the Central

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of Joe Mosesman.)

Fruit & Vegetable Company, the complainant here?

A. That's right.

Q. Did you ever receive the 10 cars of U. S. No. 1 grapes? A. We did not.

Q. Were you ready, willing and able to perform, by paying the \$1,000.00 deposit for each of the 10 cars, upon being furnished these U. S.—

A. U. S. No. 1 certificate as to the grade, and also storage arrangements when the grapes was to be in storage.

Q. Did you have the money in the bank available to make those deposits?

A. We did—or, I did, rather. [70]

Q. When did you first learn that neither the Associated nor Red Lion Packing Company were making delivery of the 10 cars to you?

A. Well, they were supposed to go in storage at the beginning of—October 10, I believe. Well, now, I am not quite sure about the dates exactly, but, at any rate, those cars were supposed to be packed as grade grapes, as U. S. No. 1, and when the grapes is placed in storage with government certificates as to the grade, and then we are supposed to wire the money, \$1,000.00 per car.

Q. When did you learn that they were not going to deliver you those grapes? Were you ever informed that they would not?

A. No, not until the ceiling was lifted.

Q. Then you were informed that they wouldn't deliver you the grapes? A. That's right.

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of Joe Mosesman.)

Q. Did you make an effort to insist on the delivery of the grapes to you in conformity with the agreement? A. We tried.

Q. But you weren't able to get them?

A. That's right. [71]

* * *

Q. State whether or not you made any effort to obtain the purchase of 10 other cars of grapes.

A. I did. I was unable to do so.

Q. What efforts did you use and what steps did you take in order to obtain the purchase of additional cars?

A. Well, we tried several different brokers to obtain grapes, and they wasn't available.

Q. What brokers did you contact?

A. Well, we have contacted Roy Wright for one, B. F. Taylor, for another, and also we tried Southwest Brokerage Company.

Q. Were you able to purchase any cars of grapes to replace those that you had contracted for?

A. No, we couldn't contract any of them. We succeeded in getting just a few. [72]

* * *

Q. In order to refresh your memory, I will ask you to state the exact number of grapes that Central Fruit & Vegetable Company purchased after October 10, 1944.

* * *

The Witness: The only one that I was able to

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of Joe Mosesman.)

get is one car from Heggblade-Margules Company, and also one car they split between West Texas Produce Company and ourselves. That one was bought from the Western Fruit Growers of Los Angeles. That was all.

Q. (By Mr. Hoppenstein): And the other replacements were made by West Texas [73] Produce Company? A. Yes, that's right.

Q. What prices did you pay for the grapes that you were able to replace?

A. Well, there was various different prices all the way from \$3.25 to \$4.25, depending on the quality.

Q. On these particular shipments that you bought? A. \$3.25 and \$4.15.

Q. In other words, one car was \$4.15 and the other one was \$3.25? A. That's right.

Q. I believe you have been experienced in the business of handling——

Examiner Griffin: If I might interrupt?

Was that for a standard car of so many lugs?

The Witness: Well, there are so many lugs. They haven't any standard loading. Some cars are loading more than others. It depends on the dimension of the cars.

Examiner Griffin: How many lugs to a car in this particular instance?

The Witness: This was 1,125 lugs, one particular car.

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of Joe Mosesman.)

Examiner Griffin: What was the price for that 1,125 lugs?

The Witness: \$3.25.

Examiner Griffin: All right. [74]

Q. (By Mr. Hoppenstein): How many lugs were there in the other car?

A. This other one was 1,105, at \$4.15.

Q. Based on your experience in engaging in the business of dealing in and handling fresh fruits and vegetables, did you know what the prevailing market price for U. S. No. 1 grapes was on or about December 10, 1944?

* * *

A. Yes.

Q. What was that prevailing price?

A. Well, that would depend on the quality. U. S. No. 1 grapes, they was quoted as high as \$4.50 f.o.b.

Q. And on or about December 10, 1944, what was the prevailing market price that was being quoted to you? A. Around \$4.00, \$4.25.

Q. Even on those quotations, state whether or not you were able to actually buy, and attempted to buy 10 cars of grapes at those figures, of U. S. No. 1 Emperors?

A. On any price, I couldn't have bought that many.

Q. Were you willing to buy them, and made offers to buy them? A. That's right.

Q. Were you able to get any confirmation from any shippers for the sale to you? [75]

Plaintiffs' Exhibit No. 5—(Continued)
(Testimony of Joe Mosesman.)

A. I was unable to get any confirmation on any amount of grapes.

Q. And those two cars were the only ones that you were able to purchase yourself?

A. That's right.

Q. By refreshing your memory, can you get the dates that you were actually able to make those particular purchases? Is that reflected on that memorandum? Did you prepare that memorandum from your records?

A. Yes. That happened on the 24th, '44.

Q. October? A. October 24, 1944.

Examiner Griffin: Both cars were purchased on that date?

The Witness: One of them on the 15th; the first on the 15th of '44, and one on the 10th and the 24th.

Examiner Griffin: The one that was purchased on the 15th, was purchased at what price?

The Witness: At \$4.15.

Examiner Griffin: And the other one?

The Witness: On the 24th, at \$3.25.

Q. (By Mr. Hoppenstein): Were grapes difficult to obtain from shippers? A. That's right.

Q. After you had received your contract for the purchase of the 10 cars of U. S. No. 1 grapes, had you made arrangements [76] to sell them, or had you resold them?

A. Well, there was quite a few of them sold.

Q. How many had you sold?

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of Joe Mosesman.)

A. Well, I would say I practically sold all of them, excepting one car. [77]

* * *

Q. (By Mr. Hoppenstein): I will ask you whether or not you received a telegram from the Playel State Marketing News Service, about December 15, 1944, relative to the quotations on the prevailing prices for U. S. No. 1 Emperors?

A. That's right.

Q. Is that the telegram that you received?

A. That's right.

Mr. Hoppenstein: We will ask the Examiner to please identify it as an exhibit.

Examiner Griffin: It will be identified as Exhibit 6.

(The telegram referred to was marked Complainants' Exhibit 6 for identification.)

* * *

Mr. Hoppenstein: We now offer Exhibit No. 6 in evidence. [79]

* * *

(The telegram marked Complainants' Exhibit 6 for identification was received in [80] evidence.)

* * *

Q. (By Mr. Hoppenstein): I will hand you a telegram addressed to Southwest Brokerage Company, Dal., signed Heggeblade-Margules Company, with a date line, San Francisco, California, 24-21,

Plaintiffs' Exhibit No. 5—(Continued)
(Testimony of Joe Mosesman.)

7P, and ask you whether or not this telegram was received by Southwest Brokerage Company in your behalf? A. That's right. [81]

* * *

(The telegram heretofore marked Complainants' Exhibit No. 7 for identification was received in evidence.)

* * *

Q. (By Mr. Hoppenstein): A telegram with the date line Los Angeles, California, October 30, 1944, addressed to Bill Taylor, broker, signed Western Fruit Growers, Incorporated, and one dated November 20, 1944, addressed to Wright & Company, Produce Exchange Building, Dallas, signed Pacific Fruit Exchange.

I will ask you whether or not those telegrams, addressed to Mr. Bill Taylor and Wright & Company, were received at your request?

A. Yes, sir.

Mr. Hoppenstein: We offer these in evidence.

Examiner Griffin: They will be received and marked Exhibits Nos. 8 and 9.

(The telegrams referred to were marked Complainants' Exhibits Nos. 8 and 9, and were received in evidence.) [82]

* * *

Q. (By Mr. Hoppenstein): Was this memorandum of the grapes that you purchased prepared by you and under your supervision?

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of Joe Mosesman.)

A. Yes, sir.

Mr. Hoppenstein: We offer this memorandum in evidence, and ask the Examiner to please identify it.

Examiner Griffin: It will be identified as Exhibit No. 10.

(The memorandum referred to was marked Complainants' Exhibit No. 10 for identification.)

Examiner Griffin: I suppose opposing counsel would like to see it (handing).

Q. (By Mr. Hoppenstein): Did you see the telegrams that were received by Mr. C. H. Robinson at Fort Worth, from the Nash-DeCamp Company in connection with the quotation of replacement grapes for the U. S. No. 1? A. Yes, sir.

Q. Who is Nash-DeCamp Company, do you know?

A. Nash-DeCamp Company is one of the largest grape shippers in California.

Q. I will ask you whether or not you know who the Western Fruit Growers, Incorporated, are? [83]

A. Yes, sir.

Q. Who are they?

A. Grape shippers. They also ship other commodities, but they principally ship grapes.

Q. Do you know who Pacific Fruit Exchange is?

A. Yes, I sure do.

Q. Who are they?

A. Grape shippers, one of the best in—

Plaintiffs' Exhibit No. 5—(Continued)
(Testimony of Joe Mosesman.)

Q. Do you know who Heggeblade-Margules & Company is?

A. They are one of the outstanding ones.

Q. I hand you a telegram dated October 24, 1944, addressed to C. H. Robinson Company, Fort Worth, from Nash-DeCamp Company, and a certified copy of a telegram from Nash-DeCamp Company, dated December 17, 1944, addressed to C. H. Robinson Company, and ask you whether or not you know if these telegrams were received by Mr. Robinson in behalf of the West Texas Produce Company?

A. Yes, sir.

Mr. Hoppenstein: We ask that these be identified, and offer them. [84]

* * *

Q. (By Mr. Hoppenstein): On this telegram dated December 17, 1944, and certified by C. H. Robinson Company, Frank Sims, do you know Mr. Sims? A. I know him personally, well.

Q. Do you know his handwriting?

A. Yes, sir.

Q. Is that his handwriting on that certificate?

A. Yes, sir.

* * *

Mr. Hoppenstein: Do you know where the original telegram is?

The Witness: No, sir, I do not.

Examiner Griffin: Do I understand, counsel, that you are offering these two telegrams in evidence?

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of Joe Mosesman.)

Mr. Hoppenstein: Yes, sir.

* * *

(The telegrams referred to were marked Complainants' Exhibits Nos. 11 and 12, and were received in evidence.) [85]

Examiner Griffin: Are you offering this memorandum in evidence, counsel?

Mr. Hoppenstein: Yes.

* * *

(The memorandum heretofore marked Complainants' Exhibit No. 10 for identification was received in evidence.)

* * *

Q. (By Mr. Hoppenstein): I will hand you an instrument, and ask you to please state what that is, Mr. Mosesman.

A. That is an invoice from Western Fruit Growers, [86] Incorporated, on a car of grapes, 1,105 display lugs at \$4.25.

Q. Is that the invoice on the car of grapes that you testified to a moment ago, for the 1,105 lugs that were divided between you and West Texas Produce Company? A. That's right.

Q. While the invoice is being circulated among counsel, I will ask you whether or not this is an invoice and drafts showing payment to Nash-DeCamp Company on the car of grapes that was purchased from them? A. Yes, sir.

Plaintiffs' Exhibit No. 5—(Continued)
(Testimony of Joe Mosesman.)

Q. It also contains a government inspection certificate attached? A. That's right.

Mr. Hoppenstein: We ask that these be identified as exhibits, and offer them in evidence.

Examiner Griffin: The invoice from Western Fruit Growers, Inc., covering 1,105 lugs at \$4.25 a lug, will be identified as Exhibit No. 13.

(The invoice referred to was marked Complainants' Exhibit No. 13 for identification. [87])

* * *

(The group of papers referred to were marked Complainants' Exhibit No. 14 for identification.)

Examiner Griffin: Are there any objections?

Mr. Moradian: The same objection as heretofore interposed by us to all this line of testimony.

Mr. Aynesworth: The same for the Respondent Kazanjian.

Examiner Griffin: The objections will be overruled, and the exhibits received in evidence.

(The invoice and group of papers heretofore marked Complainants' Exhibits Nos. 13 and 14, respectively, for identification were received in evidence.)

* * *

Q. (By Mr. Hoppenstein): I hand you an invoice from C. H. Robinson and Company to West Texas Produce Company, dated January 22, 1945, to West Texas Produce Company at Fort Worth,

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of Joe Mosesman.)

for 1,098 lugs of Emperor grapes, for the account of Zaninovich Brothers, Orange Cove, California, and ask you whether or not that is an invoice for the car of grapes purchased by West Texas?

A. Yes, sir. [88]

* * *

Mr. Hoppenstein: We offer that.

Examiner Griffin: The document marked an invoice from C. H. Robinson Company, dated January 22, 1945, covering 1098 lugs of grapes at \$5.00, will be admitted in evidence as Exhibit No. 15.

(The invoice referred to was marked Complainants' Exhibit No. 15 and was received in evidence.)

Mr. Hoppenstein: Likewise, I wish to offer in evidence an invoice of Nash-DeCamp Company to West Texas Produce Company, dated October 31, 1944, with a shipping point, Exeter. [89]

Q. (By Mr. Hoppenstein): Is that invoice from Nash-DeCamp for the 1,100 lug car?

A. Yes.

Mr. Hoppenstein: We offer that in evidence.

* * *

(The invoice referred to was marked Complainants' Exhibit No. 16 and was received in evidence.)

Q. (By Mr. Hoppenstein): I hand you this bank statement from Mercantile National Bank.

Plaintiffs' Exhibit No. 5—(Continued)
(Testimony of Joe Mosesman.)

Does that reflect the status of the account of Central Fruit & Vegetable Company? [90]

* * *

A. That's right.

Q. On those dates? A. That's correct.

Q. This shows that on November 29, 1944, you had \$36,942.28 balance in the bank, is that correct?

A. That's correct.

Q. And that on December 9, 1944, you had \$33,098.83 in the bank, is that correct?

A. That's correct. [91]

Q. And you continued to have a balance in excess of \$30,000.00 through December 30, 1944?

A. That's right.

Q. And on December 30, 1944, you had \$51,760.53 in the bank? A. That's correct.

Q. Did you continue to maintain that bank balance during that period? A. Yes, sir.

Q. Did you have a similar bank balance during the entire month of October, 1944?

A. Yes, sir.

Mr. Hoppenstein: We offer that in evidence.

Examiner Griffin: The statement from the Mercantile National Bank of Dallas, Texas, in account with Central Fruit & Vegetable Company, consisting of a two-page document showing the amount on deposit, the checks drawn against the amount, and so forth, will be received in evidence as Exhibit No. 17.

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of Joe Mosesman.)

(The statement referred to was marked Complainants' Exhibit No. 17 and was received in evidence.) [92]

* * *

Cross-Examination

By Mr. Wackerbarth: [94]

* * *

Q. Who did you talk to about this deal?

A. Harry Bockstein.

Q. When did you talk to him?

A. Just prior to Southwest Brokerage submitting a 10-car grape deal.

Q. What was that conversation?

A. I told him that Southwest Brokerage Company offered to sell to the Associated Fruit Company 10 to 15-car grapes at the price of \$2.50, and I also asked him how many would he want, and he agreed to take 6, and I agreed to take 4.

Q. Did you have any connection with the Southwest Brokerage Company? A. Not any at all.

Q. Then you talked with Mr. Jay Margules first, didn't you? A. That's right.

Q. And you found out from Mr. Margules that there was an offer on behalf of Associated Fruit, is that correct? [97] A. That's right.

Q. Then you communicated the fact to the West Texas people? A. That's right.

Q. Is that correct? A. That's right.

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of Joe Mosesman.)

Q. What did Mr. Margules tell you?

A. He told me that he could secure confirmation on 10-car grapes at \$2.50, U. S. No. 1.

Q. All right. What were the terms of the sale, with reference to payment?

A. To make a deposit of \$1,000.00 on each car, as they go into storage.

Q. \$1,000.00 as they go into storage?

A. That's right, at any time they obtained government inspection on them.

Q. What was it? At the time they go into storage, or any time that you obtained government inspection?

A. Well, at the time they obtained government inspection as to the grade.

Q. Who was to obtain the government inspection?

A. Well, that was left entirely up to the Associated Fruit Company.

Q. I didn't ask you that. What was said about who was going to obtain government inspection? [98]

A. Well, what's-his-name was the one that said he will get government inspection.

Q. What did Mr. Margules tell you about who was going to get government inspection?

A. Well, the Associated Fruit Company.

Q. They were to get the government inspection?

A. That's right.

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of Joe Mosesman.)

Q. Where was the government inspection to be made? A. Where was it to be made?

Q. Yes.

A. Well, either at the shipping point or at storage point.

Q. Either one? A. I presume so.

Q. What were you told by Margules?

A. By Margules I was told that government inspection was to be obtained, and when that was obtained, we were supposed to put up \$1,000.00 a car.

Q. How was this government inspection to be evidenced? A. That I don't know.

Q. Were you to be furnished with a certificate of inspection? A. That's right.

Q. And were you to put up your money before you received that certificate of inspection? [99]

A. No, we were supposed to put up the money after we get a certificate of inspection.

Q. Is that what Margules told you the deal was?

A. That's right.

Q. Then Margules told you that he had a deal in which he could confirm 10 cars of U. S. No. 1 Emperor grapes? A. That's right.

Q. That they were to be government inspected?

A. That's right.

Q. And that, upon inspection by the government, and the delivery to you of the certificate of inspection, that you were to put up the \$1,000.00, is that correct? A. That's right.

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of Joe Mosesman.)

Q. That is the deal that was given to you?

A. That's right.

Q. Was that the deal you accepted?

A. That's the deal I accepted, yes.

Q. How far is Margules' place from yours?

A. Well, at that time it was not over a block.

Q. Did you see any telegrams?

A. Yes. He showed me a telegram from the Associated.

Q. All right, he showed you telegrams. What telegrams did he show you?

A. From the Associated, confirming 10-car grapes.

Q. I want to show you first a telegram here which the [100] Department, in its report, has designated as Exhibit 13-A. I want you to look at that and see whether or not that telegram was shown to you, the original of that telegram?

A. Which one? Right here on this front page (indicating)?

Q. Yes.

* * *

The Witness: Yes, I remember him showing me that telegram. However, I didn't want to accept that grade grapes.

Q. (By Mr. Wackerbarth): I didn't ask you that. I asked you if he showed you that telegram.

A. That's right.

Q. He did. In the telegram did you understand the code word "AFOHD"—this word, here (indi-

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of Joe Mosesman.)

eating)—“AFOHD.” Did you understand what that meant? A. Is that a code word?

Q. What does it mean? A. I can't say.

Q. You don't know what it means, do you?

A. Not right now, I couldn't.

Q. Then there was another code word in there, “CORLU.” [101] Did you know what that meant at that time? “ADLAM CORLU.” Did you know what that meant?

A. Not unless it is translated.

Q. Did you know what it meant at that time?

A. I don't remember now.

Q. Was it translated to you at that time?

A. Well, I suppose it was, but I don't remember now.

Q. Do you know what the code word “ALBIEIQ” means? A. No.

Q. You didn't know what that was?

A. No, not unless it was translated.

Q. Was that translated to you at that time?

A. Well, I don't remember.

Q. You don't remember.

I will ask you whether or not he showed you, subsequent to that, a teletype message?

A. No, I don't remember him showing me a teletype message.

Q. Did he tell you that he had been talking with Mr. Crane over the teletype about this?

A. That's right.

Q. He told you that, didn't he?

Plaintiffs' Exhibit No. 5—(Continued)
(Testimony of Joe Mosesman.)

A. That's right.

Q. Did he tell you what Mr. Crane had said to him over the teletype? [102]

A. Well, no, I don't remember if he did say anything.

Q. Did he tell you anything about the teletype conversation?

A. Well, I can't remember that.

Q. I will ask you whether or not you were told that Mr. Margules teletyped Mr. Crane as follows:

“Referring to the Quotation on Nine Cars
US One and Nine Unclassified Emperors Do
We Have to Buy All of Them or Can We Get
Someone Buy Possible Couple of Each Go
Ahead.”

And, the reply from Mr. Crane to Mr. Margules was:

“Believe We Could Work Out the Deal on
Block of Two to Three Each. Submit It and
Will See if Can Work Out.”

Did he tell you that those were the teletype messages that passed between them? A. No, sir.

Q. Did he tell you that he had been teletyping to Crane?

A. Well, with reference to that, I don't know whether he telephoned him or whether he teletyped.

Q. Did he tell you that he either telephoned or teletyped? A. I don't remember that.

Q. You don't remember whether he told you that? [103] A. That's right.

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of Joe Mosesman.)

Q. Then I will ask you whether or not he showed you a telegram, which I show you now as Exhibit 13-B attached to the report of the investigator.

A. Yes, I remember that.

Q. You saw that one. After that telegram, did he tell you that he was going to teletype to Crane or Associated again? A. Would he?

Q. Did he tell you that he proposed to teletype or telephone or telegraph Associated?

A. Well, as far as I know, he told me he was going to get in touch with the Associated Fruit Company as to the deal.

Q. Did he tell you what he was going to ask them?

A. Well, what I told him, I remember. Now, what he told me, I don't remember. All I told him was that I was interested in 10-car No. 1 grapes.

Q. That is all you told him?

A. That's right.

Q. That was the time that he showed you this telegram, Exhibit 13-B? A. That's right.

Q. Now I will ask you whether or not he told you, after he showed you that telegram, 13-B, that he was going to teletype to the Associated Fruit Distributors as follows:

“Referring to That 6 Emperors Fort Worth and 4 [104] Dallas Deal OK 2.50 Net 5.///50.00 for U If Legal. Presume Its Legal or U Wouldn't Offer It. Advise.”

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of Joe Mosesman.)

Did he tell you that he was teletyping that message to Crane? A. No, sir.

Q. Did he tell you that he had teletyped that message to Crane? A. No, sir.

Q. Did you know that he did teletype that message to Crane? A. No, sir.

Q. I will ask you whether or not, after you had seen the telegram, Exhibit 13-B, did Mr. Margules tell you that he received a teletype message from Crane as follows:

“Haven't Been Able Contact the Shipper Yet but Sure It's Okay. Will Wire U Definitely One Way or Other Soon's Get Him. Yes It Is Legal Naturally a Receiver Can Pay His Whole Markup for Buying Brokerage if He Wants to Will Wire U Soon Receive Definite Confirmation.”

Did he tell you that he had received that teletype message from Mr. Crane?

A. Yes, I remember that.

Q. He told you that? A. Yes.

Q. Then did he tell you this, that this was another [105] teletype message from Crane to him:

“Understand Its Basis 1000.00 Deposit Against Each US One in Section as They R Loaded. What Else New Go Ahead Far as I Know That Covers It. Try Wire Nite Sure Thx End.”

Did he tell you that that was a teletype that Crane teletyped to him? A. I don't remember.

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of Joe Mosesman.)

Q. Don't you remember some conversation about the \$1,000.00 deposit against each U. S. No. 1 as they were loaded? A. Yes, sir.

Q. He told you that, didn't he?

A. Yes, sir.

Q. And he told you that the payment was to be made when they were loaded?

A. That's right.

Q. That as soon as it was loaded, they were to be paid for?

A. As soon as the government certificate is obtained, and they are entitled to get the money.

Q. That isn't what I asked you. I asked you whether or not he told you at that time that the deal that he was discussing with Crane was that the \$1,000.00 deposit against each car of U. S. No. 1's would be paid as they were loaded?

A. That's right. [106]

Q. Did he tell you that? A. Yes, sir.

Q. He told you that was his deal with Crane, didn't he? A. That's right.

Q. And that was agreeable to you, wasn't it?

A. Yes, sir.

Q. In this telegram, or these teletype messages, there was some discussion about \$50.00, and whether or not it was legal. What did he tell you about that?

A. He just mentioned the fact, whether or not it is legal or not. Of course, I wasn't interested in that part at all.

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of Joe Mosesman.)

Q. You knew what it meant, didn't you?

A. Not necessarily.

Q. What did it mean, according to your opinion, at that time?

A. Well, it was a question whether they can charge procurement charge.

Q. Didn't Mr. Margules tell you that he was willing to pay Mr. Crane a procurement charge?

A. Well, yes, I agreed with him to pay his \$50.00, yes.

Q. You were willing to pay Crane \$50.00 for getting these cars for you, weren't you?

A. That's right.

Q. And you knew that Crane was going to try and get [107] these various cars for you, didn't you, for you and Margules? A. That's right.

Q. And you knew that you were going to pay Crane \$50.00 a car for getting these cars for you, isn't that right? A. That's right.

Q. You understood that?

A. That's right.

Q. And that is what Mr. Margules told you?

A. That's right.

Q. You were agreeable to paying that, weren't you? A. Yes, sir.

Q. Who were you going to pay this 3 per cent brokerage to?

A. Southwest Brokerage Company.

Q. And you were willing to pay that?

A. That's right.

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of Joe Mosesman.)

Q. Did you see the confirmation which Associated sent to them on the 2nd of October? I will show you the telegram. Did you see this telegram (indicating)? I am showing you now the copy of the telegram of October 2nd from Associated to Southwest Brokerage.

Did Mr. Margules show you that telegram?

A. Yes, sir.

Q. He showed you that? A. Yes. [108]

Mr. Wackerbarth: I want to read into the record the telegram that I have just shown to the witness. It says:

“Secured Redlyon Packing Company Confirmation Ten Car Grapes as Outlined You Collect Deposits to Be Forwarded to Us Soon’s DUPJA Wired Each Car.”

A. I wouldn’t know, unless it was translated.

Q. You don’t know, do you? A. No.

Q. When he showed you that telegram, you didn’t know what it meant, did you?

A. No, not unless it was translated.

Q. What did he tell you at that time? Did he tell you that that was the deal with reference to the \$1,000.00?

A. The deal was, if the grapes is loaded in the car and obtained government inspection, we are supposed to forward the money. [109]

Q. Were you supposed to forward the money just as soon as the government inspection was made? A. Yes, sir.

Plaintiffs' Exhibit No. 5—(Continued)
(Testimony of Joe Mosesman.)

Q. Or until you received the certificate of the inspector?

A. The money was supposed to be forwarded just as soon as government inspection is obtained.

Q. Whether you see the certificate or not, is that correct? A. That's right.

Q. Did you see this standard memorandum of sale, this confirmation that Mr. Margules made out? A. Yes, sir.

Q. And you saw it before it was sent in, didn't you? A. Yes, sir.

Q. And the terms in that standard memorandum of sale were agreeable to you? A. Yes, sir.

Q. And up at the top, with reference to this sale, it says that it was sold through a telephone conversation between Harry Bockstein, does it—

A. That's right.

Q. —and telegram of Joe Mosesman?

A. That's right.

Q. What part of the telegram did you [110] send?

A. I never sent any telegrams to anyone. That was just a telephone conversation. He agreed to buy 10 cars and split them with West Texas Produce Company.

Q. Wait a minute. This is between West Texas Produce Company and Central Fruit and Associated on account of Red Lion, isn't it?

A. That's right.

Q. What part did you take in that deal with

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of Joe Mosesman.)

reference to the telegram here that has your name after it, Joe Mosesman?

A. What telegram do you refer to?

Q. I don't know. That is what I am asking you.

A. Well, I don't know.

Q. You see down there that it says "telegram," don't you? A. Where?

Q. Right up there (indicating), it says "telegram, Joe Mosesman."

A. Well, now, it is "telephone, Joe Mosesman."

Q. No, it is "telephone, Harry Bockstein," isn't it?

A. That's right, and he phoned me, too. It was done by telephone. That was never done by telegram.

Q. And there were no telegrams that you have had any part in, is that correct?

A. That's right. [111]

Q. But you did see these various telegrams that were sent to Mr. Margules?

A. Some of them I have saw, yes.

Q. I want to show you this confirmation. You knew that at the time this confirmation was shown to you, Red Lion Packing Company was the shipper, didn't you?

A. Well, that is questionable. I couldn't answer that. All I knew is that I had dealings with the Associated Fruit Company, the original deal.

Q. You knew that the Associated or Mr. Crane was trying to get some grapes for you, didn't you?

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of Joe Mosesman.)

A. That's right.

Q. And you knew he was trying to get them from somebody, didn't you? A. Well, yes.

Q. At the time——

A. At the beginning of it, I didn't know anything about it, no, sir.

Q. But, on the second day of October, 1944, you did know who Mr. Crane was trying to get the grapes from, didn't you?

A. Well, I understood that Red Lion Packing Company was underwriting that order.

Q. Then you understood, on the morning of the third of October, that Mr. Crane was trying to get for you from the [112] Red Lion Packing Company 10 carloads of Emperor grapes, is that correct?

A. Yes, sir.

Q. And that was satisfactory to you for him to try and get those grapes for you, wasn't it?

A. Well, yes. I wasn't particularly interested in where he was getting them from.

Q. But you were agreeable to him getting them from Red Lion, weren't you?

A. I understood when I got a confirmation that Red Lion Packing Company was supposed to supply that order.

Q. Didn't you know before?

A. Previous to that? No, sir.

Q. Before this standard memorandum of sale was prepared, didn't you know that Red Lion

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of Joe Mosesman.)

Packing Company was going to furnish these grapes?

A. At the beginning of the deal, I didn't know who was going to furnish the 10 cars of grapes. Later on I found out that the Red Lion Packing Company was the one to furnish the grapes.

Q. You saw this telegram of October 2nd, didn't you? A. Yes.

Q. When you saw that telegram, then you knew that Red Lion Packing Company was going to furnish the grapes, didn't you? [113]

A. That's right.

Q. And that was on the second of October?

A. Well, I suppose it was.

Q. After you read this telegram of October 2nd, did Mr. Margules tell you that the \$1,000.00 was to be paid as soon as the government inspection was wired, or as soon as the government inspection was made?

A. As soon as the government inspection was wired—well, let me see now—as soon as the government inspection was made.

Q. Was made? A. That's right.

Q. That was your understanding?

A. That's right.

Q. Just as soon as the government inspection was made, regardless of what the inspection was, you were to wire the \$1,000.00?

Plaintiffs' Exhibit No. 5—(Continued)
(Testimony of Joe Mosesman.)

A. Not regardless of what the inspection was. It was based on U. S. No. 1 quality.

Q. So that if the fruit wasn't U. S. No. 1—

A. Then it was optional to me to take it or leave it.

Q. And that was your understanding now?

A. That's right. I bought U. S. No. 1 grapes.

Q. Mr. Mosesman, you knew, on or about the 9th of October that the Red Lion Packing Company did not intend to [114] ship those 10 cars, didn't you?

A. Well, I suppose so. October when? The 9th?

Q. October 9th.

A. I guess so. That is when they refused to ship it.

Q. When did you first find out that Red Lion did not intend to ship those 10 cars?

A. Well, that happened just as soon as the ceiling was raised, I suppose.

Q. When was that?

A. I can't remember that exactly.

Q. That was around the 8th or 9th, wasn't it, the 7th, 8th, 9th, thereabouts?

A. Along abouts.

Q. Who told you that the Red Lion didn't intend to ship?

A. Southwest Brokerage Company, Mr. Margules.

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of Joe Mosesman.)

Q. What did you do then about securing other red Emperors, U. S. No. 1 grapes?

A. Well, I tried, but I was unable to get any.

Q. You were unable to get any?

A. That's right.

Q. You were offered U. S. 1 grapes, were you not?

A. Yes, that is true, I was offered U. S. No. 1 grapes for sale, but I never was able to get any of them.

Q. Didn't you receive telegrams to the effect that Red Lion Packing Company would furnish you U. S. 1 Emperor grapes [115] at \$3.00?

A. Yes, sir, not with U. S. No. 1, he didn't.

Q. What did he tell you? A. Unclassified.

Q. Red Emperor grapes? A. Yes.

Q. What price did they offer them to you at?

A. Well, if I remember exactly right, it was around \$3.00, \$3.25.

Q. When was that offer made to you?

A. That was after the ceiling was raised.

Q. You rejected that offer, didn't you?

A. That's right.

Q. Then did you inquire from anyone else as to whether or not you could get U. S. No. 1?

A. I have tried, yes.

Q. Who did you try?

A. Well, you mean, as far as my brokers is concerned, or the shippers?

Plaintiffs' Exhibit No. 5—(Continued)
(Testimony of Joe Mosesman.)

Q. No. What did you do about trying to get U. S. 1's as soon as you knew?

A. I have contacted several different brokers.

Q. Who did you contact?

A. Bill Taylor, for one. Roy Wright, for another. Southwest Brokerage Company, for a [116] third.

Q. And they were all in Dallas, Texas?

A. That's right.

Q. Did you communicate at that time, that is, immediately upon hearing that Red Lion would not ship, did you contact anybody in California?

A. Direct, or through a broker?

Q. Direct. A. Direct, I did not.

Q. Who did you contact in California through a broker during the days of the 9th to the 15th of October, 1944?

A. Well, I just said Southwest Brokerage Company, for one, Bill Taylor for another, and Roy Wright, for a third.

Q. Those were Dallas, Texas, brokers?

A. All of them.

Q. Did you contact anybody in California through those brokerage houses, or either of them, to try and get you U. S. 1 Emperor grapes?

A. Have they tried? Yes.

Q. I am asking you if you tried to get U. S. No. 1 grapes through either one of those three brokerage houses, that is, from California?

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of Joe Mosesman.)

A. Yes, sir.

Q. All right. Who did they contact in California between the 9th and the 15th of October, to try and get you U. S. No. 1 Emperor grapes? [117]

A. Roy Wright contacted Pacific Fruit.

Q. Do you have here any telegram to the Pacific Fruit between the 9th and the 15th of October, 1944?

A. Do I have in my possession?

Q. Yes.

A. No, sir, I do not.

Q. Did you ever see a telegram between those two dates?

A. Well, I think there are some here, yes.

Mr. Wackerbarth: Do you have any, counsel?

Mr. Hoppenstein: I think I have. I will see just exactly what we have.

Pacific Fruit (handing), Western Fruit Growers (handing), Heggeblade-Marguleas (handing).

Q. (By Mr. Wackerbarth): Who did Southwest Brokerage Company contact, to your knowledge, in an effort to get some California U. S. 1 red Emperor grapes?

A. I think his next shipment was Heggeblade-Marguleas. He probably tried several others, which I don't know for sure.

Q. Did he show you a telegram, that is, Southwest Brokerage, from Heggeblade-Marguleas?

A. I think he did.

Q. Now I want to show you a telegram which

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of Joe Mosesman.)

your counsel has offered. Is this the telegram which Southwest Brokerage showed you? [118]

A. Yes, sir.

Q. Do you know when this was shown to you?

A. Well, I can't remember the exact date.

Q. How long was it after you were informed that Red Lion would not ship these grapes? Within a month? A. Oh, no.

Q. Within three weeks?

A. No. You mean, when I start inquiring of getting any other grapes?

Q. Yes.

A. Possibly in—oh, say four or five days; a week.

Q. Do you know when this telegram came through. Did it come through within a week after you were notified? A. I don't remember that.

Q. Anyhow, this telegram states:

“Offer Sub Confirmation US One Emperor Shipment by December Tenth 325 FOB Plus Accrued Storage Charges Which Are Seven Cents for First Month and Five Cents Each Additional Month from Date of Storage Plus Loading and Gassing.”

So that you did know, then, that during the month of October, that you could buy U. S. 1 Emperor grapes for \$3.25 f.o.b. plus seven cents for the first month's storage, and five cents for each additional month, shipments to be by, on or about December 10th, didn't you?

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of Joe Mosesman.)

A. Yes, I know, but we was unable to get them, even [119] at that.

Q. What did you do about confirming this offer of Heggeblade-Marguleas?

A. I asked them to go and get it.

Q. Did they confirm an order to Heggeblade-Marguleas?

A. Did Heggeblade-Marguleas confirm the grapes to——

Q. Did Southwest Brokerage confirm this offer of Heggeblade-Marguleas?

A. Did Southwest Brokerage Company——

Q. Confirm this offer of Heggeblade and Marguleas to ship Emperor grapes by December 10th at \$3.25 f.o.b. plus accrued storage charges and loading and gassing?

A. Yes, sir.

Q. They did confirm that? Where is the copy of the telegram in which they confirmed this offer?

A. He did not confirm any, because we couldn't get them to confirm.

Q. All right. Here they offered them to you, didn't they, in this telegram?

A. That's right.

Q. What did you do about trying to——

A. I have told them to get them.

Q. All right. You told them to get them?

A. That's right.

Q. Did he telephone Heggeblade-Marguleas, or did he [120] wire them?

A. I don't know whether he phoned them or

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of Joe Mosesman.)

wired them or teletyped them, that I do not know. The fact remains, though, that he told me he tried to get the grapes, but they were sold out the following day when this telegram came in.

Q. Then, so far as you know, he did not wire Heggeblade-Marguleas to get these ten cars of red Emperors?

A. That I couldn't tell you, whether he wired them or not, or he teletyped them, or he phoned them.

Q. But he did tell you that when he contacted them, they had been sold? A. That's right.

Q. And he didn't tell you, when he contacted them, how long after it was that he had received this telegram that he contacted them, did he?

A. Well, possibly the following day or the day after, I suppose.

Q. Did he tell you how long it was?

A. Well, I don't remember exactly.

Q. Well, did he tell you?

A. Yes, he did tell me that he couldn't get them. That I do know.

Q. Did he tell you how long it was between the time of the receipt of this telegram and the time that he sought to confirm the offer? [121]

A. You mean, how much time——

Q. Elapsed, yes.

A. Elapsed? Well, I suppose it would be just guesswork now, I don't know.

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of Joe Mosesman.)

Q. If you don't know, say so.

A. Okay. [122]

* * *

Q. (By Mr. Wackerbarth): Then I am going to direct your attention to the telegram of October 30th from Western Fruit Growers to Bill Taylor, a broker at Dallas, Texas, dated October 30—that is 1944, isn't it—and they told you that good storage Emperors were now bringing \$3.50 f.o.b., but, "we are not selling any until after January 1st."

Did you or Mr. Margules make any effort to tie up 10 cars of them at that price?

A. Yes, we tried to, but they wouldn't sell them.

Q. They wouldn't sell them to you?

A. That's right.

Q. In other words, both of these companies here committed themselves, or offered to sell them, and when you went back to get them, you couldn't get them, is that it?

A. That's right.

Q. Did you telegraph Western Fruit Growers, or did Mr. Margules telegraph Western Fruit Growers?

A. No, I think Bill Taylor is the one that handled that.

Q. Did Bill Taylor telegraph Western Fruit Growers?

A. I think he did, yes. [123]

Q. Did you have a copy of the telegram?

A. No, sir.

Q. Did you ever see it?

A. No, sir.

Plaintiffs' Exhibit No. 5—(Continued)
(Testimony of Joe Mosesman.)

Q. Do you know how long it was after that, after he received this telegram, that he telegraphed them? A. I can't remember.

Q. I direct your attention to the telegram of November 20th, from the Pacific Fruit Exchange to Wright and Company. A. Yes, sir.

Q. Did you ask Wright and Company to try and get you some grapes? A. That's right.

Q. When did you ask them to try and get you grapes?

A. Well, after I found out I couldn't get them.

Q. As a matter of fact, didn't you wait until the approximate dates of the telegrams before you asked them to try and get you grapes?

A. Well—the approximate date?

Q. Yes.

A. Not until I found out I couldn't get grapes.

Q. In other words, you didn't wait from October 9, 1944, to November 20, 1944, to ask somebody to try and get you grapes?

A. I tried all along, since I found out I couldn't get [124] the grapes, various ones.

Q. You testified that you contacted Bill Taylor or Southwest Brokerage and Wright and Company?

A. That's right.

Q. The telegram of Pacific Fruit Exchange to Wright and Company is dated November 20, 1944. Did you wait from October 9th to November 20th before you took it up with Wright and Company?

A. Possibly I did.

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of Joe Mosesman.)

Q. Possibly you did? A. That's right.

Q. Your best recollection is that you did wait that long, isn't it?

A. Well, I am not positive. Possibly I did.

Q. What is your best recollection with reference to having Bill Taylor contact the Western Fruit Growers? Did you wait until October 30th for that? A. Well, yes.

Q. With reference to Southwest contacting Heggeblade-Marguleas, did you wait until October 24th for that, to have them contact them?

A. Yes, sir.

Q. With reference to this Pacific Fruit Exchange telegram, it says as follows:

“Storage Emperors Now Read for Distribution.” [125]

“Read” means ready, doesn't it?

A. That's right.

Q. Do you want to look at this while I am reading it? A. Go right ahead.

Q. “Fiance.” Do you know what that means?

A. No, sir.

Q. It seems to be a code. It seems to be broken down here so that it reads:

“Best Car Deal for One Car Is Three and a Half for US Ones Unclassified Touchdown or Other Label Equal Quality. Burdock Storage Gassing Handling and so Forth. Paid to December Fifth to Tenth Our Option but Storage and Transit Payable by Buyer If Applicable on Confirmation Forsake——”

Plaintiffs' Exhibit No. 5—(Continued)
(Testimony of Joe Mosesman.)

That is a code word, and apparently it means, "You collect and remit."

Then it says, "Cobweb," which apparently is a \$500.00 deposit on each car.

"We Will Draft It Usual Manner for the Balance."

When you received that message on November 20th, what did you do about getting those 10 cars of red Emperor grapes?

A. We stepped in to buy the following day, and they were sold.

Q. What else did you do after you found that these folks had sold out everything immediately after they made their offers to you? [126]

A. Stayed without grapes.

Q. You did without grapes, and that is all that you did, is what you have testified to here, as far as getting grapes?

A. That's right.

Mr. Wackerbarth: That is all.

Cross-Examination

By Mr. Aynesworth:

Q. Mr. Mosesman, when you signed that, you expected in some way to be notified of the condition of the grapes on inspection, didn't you?

A. Yes.

Q. Then, did you expect those inspection certificates to be forwarded to you for observation?

A. No, sir.

Plaintiffs' Exhibit No. 5—(Continued)
(Testimony of Joe Mosesman.)

Q. In what way were you to find out as to whether or not the inspection certificates were sufficient?

A. Well, customarily they mail them.

Q. Then you expected them to be mailed to you, is that right? A. That's right.

Q. And you understood then that you were to have those mailed to you, and, upon their receipt, if they showed U. S. No. 1, then you would remit?

A. Yes, sir.

Q. And you would remit by a sight draft on one of the [127] banks, is that right? A. Yes, sir.

Q. This instrument you are looking at, when it uses the expression "draft" there, West Texas to First National Bank, Fort Worth, draft, Central Fruit to Mercantile Bank, Dallas, you meant to use that method of making payment on the deposit as well as the final payment, is that right?

A. Yes, sir.

Q. And Mr. Margules, the agent there, was the man you dealt with, the local broker, is that right?

A. Yes, sir.

Q. And he explained to you that that was the method that you would use in making payment, did he?

A. Well, the method of making payment is—I was supposed to pay for the entire amount of the grapes.

Q. You were to pay for them at two different

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of Joe Mosesman.)

times, but you were to use the sight draft method of doing it, is that right?

A. Well, I don't remember exactly the method of paying them. All I do remember is that we were supposed to have advanced \$1,000.00 a car on each car, and then draw the difference for the balance as we ordered them out.

Q. Then you expected to send that \$1,000.00 deposit as soon as you received the certificate of inspection, is that right? [128]

A. Yes, sir.

Q. In view of the fact that this agreement here, which is attached as a part of the pleading as Exhibit 2 on the complaint—I notice that that is made with Associated Fruit Distributors, and so forth—it was your understanding, was it not, that you were to send that money, the initial deposit, and so forth, to the Associated Fruit Distributors?

A. Yes, sir.

Q. And then depend upon them to transmit it—if the Red Lion were the people supplying you with the grapes, that they would transmit it in turn to the Red Lion Packing Company?

A. Yes, sir.

Q. You of course regarded Mr. Crane, that is, the Associated Fruit Distributors, as acting for you and as your employee in procuring this fruit for you, didn't you?

A. Well, yes.

Q. And he and the Southwest Brokerage Company were both acting for you in trying to procure grapes, were they not?

A. That's right.

Q. Mr. Mosesman, when these various telegrams

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of Joe Mosesman.)

were read to you, having the code words in them, I believe you did not personally understand the meaning of the various code words, did you?

A. Well, generally they translate them before they bring the wire up to the office, or they telephone me that car so-and-so has been [129] confirmed.

Q. Just let me get at this, please.

You personally did not know how to interpret those code words, did you?

A. Not looking at them, no, sir.

Q. When counsel was questioning you a moment ago about those words, you do not remember that Mr. Margules at any time translated those words to you? That is, you have no distinct recollection of it now, do you?

A. That's right.

Mr. Hoppenstein: What do you mean by "That's right"?

The Witness: Yes, sir.

Q. (By Mr. Aynesworth): In other words, by "That's right," you mean that you do not now remember his interpreting them?

A. That's right.

Q. I will reframe the question.

As I understand you now, you do not have any definite recollection that Mr. Margules at any time translated any of those code words to you, as you sit here now?

A. Oh, yes. He does translate code words when he brings the wire into the office.

Plaintiffs' Exhibit No. 5—(Continued)
(Testimony of Joe Mosesman.)

Q. Did you go to his office to see these telegrams, or did he come to your office? What is your recollection?

A. Well, he comes to my office.

Q. Are you sure he did in all these cases? [130]

A. Always.

Q. You never went to his office, then?

A. No, sir.

Q. Except as to the telegrams you saw, all your testimony with respect to Mr. Margules in connection with the Associated Fruit Distributors, is purely hearsay, isn't it?

Mr. Hoppenstein: Ask him if he knows what hearsay is.

Q. (By Mr. Aynesworth): In other words, it is just what Mr. Margules or someone told you, isn't it?

A. Well, no. He showed me wires.

Q. No. I say, aside from the wires that he showed you, your testimony with respect to this matter is purely hearsay, just what someone else told you, is that right?

A. Well, I can't understand exactly what you mean.

Q. Have you ever seen Mr. Crane?

A. No, sir.

Q. You don't know him? A. No, sir.

Q. And you had no telephone conversations with him? A. No, sir.

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of Joe Mosesman.)

Q. You did not have any teletype messages from him, or didn't send any to him?

A. No, sir.

Q. You personally did not have any control over or direction [131] of Mr. Crane in this matter, did you?

A. No, sir.

Q. You of course are in no wise related to Mr. Margules?

A. No, sir.

Q. And you are not in any wise related to these people whom you speak of as your associates or partners?

A. No, sir.

Q. Other than just business associates?

A. Yes, sir.

Mr. Aynesworth: I think that is all.

Examiner Griffin: Are there any further questions of the witness?

Cross-Examination

By Mr. Wackerbarth:

Q. Mr. Aynesworth asked you as to whether or not you regarded Crane as acting for you, and you said that you did. That was your statement, wasn't it?

A. Yes, sir.

Q. And that was correct, wasn't it? Your statement was correct, wasn't it?

A. Yes, sir.

Q. Then was it your understanding that you were to pay Crane this \$1,000.00, and he was to send it on to Red Lion for you? That is what you understood he was to do, wasn't it?

A. Yes. [132]

Plaintiffs' Exhibit No. 5—(Continued)
(Testimony of Joe Mosesman.)

Mr. Wackerbarth: Okay. That is all.

Redirect Examination

By Mr. Hoppenstein:

Q. About October 9, 1944, when you discovered that Red Lion wasn't going to ship the 10 cars to you, what did you do immediately with reference to contacting brokers to buy your additional grapes, or what did you do?

A. I have tried to get those brokers that I mentioned to replace those 10 cars of grapes immediately.

Q. How often would you see these brokers to tell them to get these grapes for you?

A. Every day.

Q. When they received wires quoting prices on grapes and the three wires mentioned just a moment ago, state whether or not you would authorize the broker to buy the grapes at those prices?

A. They were authorized to buy.

Q. Up to how many?

A. Up to 10 cars.

Q. And you were able to buy two cars, I believe, yourself? A. That's right, yes, sir.

Q. And West Texas, through their brokers, were able to buy a certain number of cars themselves?

A. Yes, sir.

Q. Of your own knowledge, do you know whether or not [133] West Texas was making efforts,

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of Joe Mosesman.)

through their brokers, to try to obtain additional cars of grapes from October 10th through the balance of October, 1944?

A. Well, I suppose they did. I guess they tried as hard as I did.

Q. Did you see any of the wires that they received from their brokers?

A. I can't remember exactly. I don't remember seeing any of them. It was only over a telephone conversation that they possibly told me that they have tried it.

Q. State whether or not you would have bought 10 cars of grapes if you were able to buy them?

A. Yes, sir, I would.

Q. Isn't it a fact that during this period, from October, 1944—

Mr. Wackerbarth: You wouldn't by any means lead the witness, would you, counsel?

Mr. Hoppenstein: All right. I will try to re-frame my question. We are rather informal here.

Q. (By Mr. Hoppenstein): Do you know of your own knowledge whether or not any of the shippers wired back whether or not they were able to furnish any crates under your acceptances, direct to you? Did you receive any direct wires?

A. Direct wires from—no, sir. [134]

Q. Are you acquainted with these particular brokers, Mr. Wright and Mr. Taylor and Southwest Brokerage?

A. I know them well.

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of Joe Mosesman.)

Q. Would they report to you from day to day as to what results they were having?

A. Yes, sir.

Q. State from whom you expected to receive the delivery of the 10 cars of grapes?

A. Well, as far as——

Mr. Wackerbarth: Object to it as calling for a conclusion of the witness.

The Witness: Associated Fruit Company.

Q. (By Mr. Hoppenstein): State whether or not you considered them a seller to you.

A. Yes, sir.

Mr. Wackerbarth: Object as calling for a conclusion of the witness.

Examiner Griffin: Let us rule on these objections.

I think the witness may answer, anyway.

Q. (By Mr. Hoppenstein): What was your understanding with reference to your method of sending the \$1,000.00 upon the obtaining of government U. S. No. 1 inspection? How were you to make that \$1,000.00 payment? [135]

A. That was supposed to be given to the Southwest Brokerage Company, and they were supposed to mail it in to—what is the name of that concern?

Mr. Wackerbarth: Red Lion, or Associated?

The Witness: No, Associated.

Q. (By Mr. Hoppenstein): Who was to notify

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of Joe Mosesman.)

you when U. S. No. 1 inspection certificates were obtained?

A. Southwest Brokerage Company.

Q. Had you had any prior dealings with Mr. Crane or the Associated before this transaction?

A. Yes. [136]

* * *

Q. (By Mr. Hoppenstein): Did you consider the Associated Fruit an employee of yours or of Red Lion? [138]

* * *

The Witness: An employee of mine or the Red Lion? Is that the question?

Q. (By Mr. Hoppenstein): That's right.

A. Well, I considered them as an employee of Red Lion.

Q. You were agreeing, however, to pay them \$500.00 for their services in connection with this transaction?

A. That's right.

Q. Associated was never relying on your payroll, were they?

A. No, sir.

Q. Prior to this transaction, had you ever paid them any fee?

A. No, sir.

Q. State whether or not you were looking to Associated [139] to obtain delivery of the 10 cars of grapes to you?

A. Yes, sir.

Mr. Hoppenstein: That is all.

Plaintiffs' Exhibit No. 5—(Continued)
(Testimony of Joe Mosesman.)

Recross-Examination

By Mr. Wackerbarth:

Q. What were you going to pay them \$500.00 a car for? A. That was their terms.

Q. I know, but you were going to pay it to Associated, weren't you? A. That's right.

Q. What for?

A. To secure the grapes, I suppose.

Q. And you wanted them to get them from whomever they could, didn't you?

A. Well, to me it wouldn't make any difference.

Q. As long as they got you grapes, they could get them from anybody they could get them from, couldn't they? A. Yes, sir.

Q. And, for their services in getting these grapes, you were going to pay Associated \$500.00 a car? A. On that deal I was, yes, sir.

Q. And you were perfectly willing to pay them for getting these grapes for you? A. Yes, sir.

Mr. Wackerbarth: All right. [140]

Mr. Aynesworth: Just one further question.

Recross-Examination

By Mr. Aynesworth:

Q. At the time that Mr. Margules mentioned to you that he had discussed with the Associated Fruit Distributors the matter of procuring Emperors for you, you had never heard of the Red Lion Packing Company, had you? A. No, sir.

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of Joe Mosesman.)

Q. And at the time you were called in and shown this particular confirmatory contract, so to speak, up to that moment, you had never heard of the Red Lion Packing Company, had you? A. No, sir.

Q. At the time that you were called in to approve that, you knew that the Associated Fruit Distributors had expected you to pay them for their service in procuring these Emperors, didn't you?

A. Yes, sir.

Q. And you had at that time investigated and inquired of Margules if it was legal for you to so use their services and pay for them, didn't you?

A. Yes, sir.

Q. And were told that it was proper, weren't you? A. Yes, I thought so, yes.

Q. And you thought at that time, when you were paying [141] them that \$500.00, that they were rendering a service to you in procuring the Emperors, didn't you? A. Yes, sir.

Q. And you in that way considered them your agents in procuring grapes for you, didn't you?

A. Yes, sir.

Mr. Aynesworth: That is all.

Examiner Griffin: Are there any further questions of the witness?

Mr. Hoppenstein: That is all.

Examiner Griffin: You are excused.

(Witness excused.) [142]

Plaintiffs' Exhibit No. 5—(Continued)

JAMES P. COYN

a witness recalled on behalf of the respondent, Associated Fruit Distributors of California, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Wackerbarth:

Q. Mr. Coyn, you have heretofore been sworn and testified that you were the traffic dispatcher for the—— A. Traffic manager.

Q. Traffic manager. As such, you have custody of the files of the Associated Fruit Distributors?

A. That's right.

Q. And you have familiarized yourself with the files in connection with this transaction?

A. I have, yes.

Q. I want you to take the report of the investigating officer for the Department here, and examine the telegram which is set forth as Exhibit 13-A.

A. I have read the telegram.

Q. Was that a telegram that was directed to the Southwest Brokerage Company alone, or to other institutions? If you desire to use your records to determine that answer, you may. I will hand them to you.

A. That is a telegram that was directed—what we term a “book wire”—the same telegram goes to a number of receivers. [149]

Q. How many was that sent to?

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of James P. Coyn.)

A. Thirteen.

Q. Then I will ask you whether or not the Associated received any response from Southwest Brokerage Company, and, if so, state what the response was. Just answer yes or no.

A. Yes, we did.

Q. What was that response?

A. A teletype conversation the following day.

Q. With whom?

A. With Southwest Brokerage.

Q. What was the substance of that teletype conversation, so far as this telegram is concerned?

A. Southwest said:

“Referring Quotation On Nine Cars US One and Nine Unclassified Emperors Do We Have to Buy All of Them or Can We Get Someone. Buy Possible Couple of Each. Go Ahead.”

We replied:

“Believe We Could Work a Deal on Block of Two Three——”

Q. Two-three each? A. Two-three each.

“Submit It and Will See If Can Work Out.”

Q. Now I will ask you whether or not, subsequent to that teletype conversation, was another telegram sent out by Crane or Associated Fruit Distributors?

A. The second telegram was sent. [150]

Mr. Aynesworth: Would you mind stating the date?

Mr. Wackerbarth: I am going to. I just asked the question.

Plaintiffs' Exhibit No. 5—(Continued)
(Testimony of James P. Coyn.)

Q. (By Mr. Wackerbarth): Was there another one? A. On October 2nd.

Q. Now look at this telegram, which is Exhibit 13-B. I will ask you whether or not that telegram was sent out on October 2nd?

A. It was sent on October 2nd.

Q. And that was sent to some 13 brokerage houses? A. 13 houses, that is correct.

Q. That has a code word in that telegram. Would you please read the telegram, interpreting the code?

A. "Referring to Our Night Letter of 26 Quoting Futures Emperors Secured Revised Deal Fifteen Cars Usone 2.50 Net Same Deal. Wire Quick if Wanted Any Part."

Q. And that was the book wire that was sent to some 13 brokers? A. Yes, sir.

Examiner Griffin: What was the date of that, please?

The Witness: October 2nd.

Q. (By Mr. Wackerbarth): What time was that sent out on the 2nd of October?

A. 9:10 a.m.

Q. That was in the morning. Now I will ask you whether [151] or not subsequent to that being sent out at 9:10 a.m. on October 2nd, did you talk over the teletype with Southwest Brokerage?

A. Yes, we did.

Q. Will you please state the substance of that teletype conversation?

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of James P. Coyn.)

A. Southwest Brokerage called us on the teletype. He said:

“Referring the Six Emperors Fort Worth and Four Dallas Deal Okay 2.50 Net. 50.00 for You if Legal. Presume It Is Legal or You Wouldn't Offer It. Advise Go Ahead.”

Q. Did you advise? A. We replied:

“Haven't Been Able Contact the Shipper Yet but Sure It Is Okay. Will Wire You Definitely One Way or Other Soons Get Them. Yes, It Is Legal Naturally. The Receiver Can Pay His Whole Markup for Buying Brokerage if He Wants to. Will Wire You Soons Receive Definite Confirmation. Understand His Basis Thousand Dollar Deposit Against Each Usone Inspection as They Are Loaded. What Else New. Go Ahead.”

To which he replied:

“As Far as I Know That Covers It. Try Wire Night Sure.”

Q. After this teletype, do you know whether or not Mr. Crane or the Associated sent another teletype or telegram to the Southwest Brokerage? [152]

A. We did, yes.

Q. At what time did you send this other telegram? Was it a telegram or teletype?

A. Telegram.

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of James P. Coyn.)

Q. What time did you send it?

A. We sent it 5:25 p.m., October 2nd.

Q. Is that the telegram which is attached to the complaint as Exhibit 1?

A. Yes, that's the same one.

Q. That Exhibit 1 shows the telegram as received by the Southwest Brokerage Company, does it?

A. Yes, that is a photostat copy of the telegram received at that end.

Q. And if that telegram was sent out at 5:25 p.m. on October 2nd, can you state whether or not these figures down here signify that it was received at Southwest Brokerage or at Dallas, Texas, at 8:24 a.m.?

A. Well, it was sent as a night message.

Q. At 5:25?

A. At 5:25 p.m. And, the time at the bottom of the message on the received copy is ordinarily the time the message is received.

Q. That is, received at the Dallas office of the Western Union, is that correct?

A. Yes, that's correct. [153]

Q. Now I will ask you whether or not, on the 3rd of October, any telegrams or teletypes passed between Associated and Southwest?

A. On October 3rd—

Q. Answer yes or no. A. Yes.

Q. All right. What telegram was sent to Southwest, if any?

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of James P. Coyn.)

A. A telegram was sent on October 3rd.

Q. At what time?

A. At 10:10 a.m., and it says:

“Did You Sell.”

Q. I want to show you this telegram, before you go further.

Is that the same telegram that is referred to as Exhibit 13-D, having been received at Dallas, Texas, at 10:16 a.m.?

A. That's the same wire, yes.

Q. Now I will ask you whether or not, in response to that telegram, did you receive a telegram from the Southwest Brokerage Company?

A. Yes, we did.

Q. I show you here Exhibit 13-E, attached to the investigator's report, and ask you if that is the telegram which you received back from them?

A. Yes, that's the same telegram. [154]

Q. What time did you receive back the telegram designated Exhibit 13-E?

A. 11:31 a.m.

Q. On the 3rd of October?

A. On the 3rd of October.

Q. Up to that point of time, had you received the so-called “standard memorandum of sale” and the confirmation by Margules?

A. No, we had not.

Q. Do you know how they received that, by mail, or how?

A. Well, of my own knowledge I don't know, but it would have to be by mail, either ordinary or airmail.

Plaintiffs' Exhibit No. 5—(Continued)
(Testimony of James P. Coyn.)

Q. Is that the customary method?

A. That is customary.

Q. Have you testified to all of the messages and teletypes that passed between Southwest and Associated, to the best of your ability?

A. Yes, sir, I have.

Q. And there are no others that you know of?

A. No, there are none.

Q. Other than what you have testified to here?

A. No others.

Mr. Wackerbarth: Take the witness.

Mr. Aynesworth: No questions.

Mr. Hoppenstein: I believe I have one. [155]

Cross-Examination

By Mr. Hoppenstein:

Q. Mr. Coyn, weren't there some other telegrams sent from Associated to Southwest Brokerage, and from Southwest Brokerage to Associated, on October 9th, 10th?

A. They are all in the record, yes.

Q. Weren't these telegrams that you are talking about in the record, too?

A. Some of them were; some of them were not.

Q. The telegrams that are in the record, known as Exhibits 13-M, 13-O, 13-P—

Mr. Wackerbarth: Just a minute. Let the witness check them, will you please, counsel?

Mr. Hoppenstein: Surely.

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of James P. Coyn.)

Examiner Griffin: In order that the record may be clear, I wish it to show that the exhibit numbers that are being referred to here by both counsel are those numbers appearing on the photostatic copies of these exhibits which are attached to the investigator's report, as distinguished from the exhibit numbers that have been given to the documents at this hearing.

Mr. Wackerbarth: I might say, counsel, we do not question but what, commencing October 9th, another series of telegrams passed. I was only trying to identify the telegrams leadings up to this standard confirmation. We concede the other [156] telegrams as outlined there did pass.

Mr. Hoppenstein: It is stipulated that they did pass in the regular course of business?

Mr. Wackerbarth: That is correct.

Q. (By Mr. Hoppenstein): I would like to direct your attention, please, sir, to the telegram that is marked Exhibit 13-R. Do you know what date that telegram was sent to Southwest Brokerage?

A. Looking at this photostat copy, I can't determine the month.

Q. Would you have a copy in your office files, that are under your supervision?

Mr. Wackerbarth: That has not been furnished me.

Q. (By Mr. Hoppenstein): Would you gather that it was October 16, 1944?

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of James P. Coyn.)

A. Connecting it up with the other wires, I would say yes.

Q. In that telegram, Associated wired Southwest Brokerage, did they not:

“Again Talked Red Lion. They State Definitely Unwilling Abide Any Sales Made Where Ceiling Definite. Consideration. Furthermore Crops Short. Not Packing Usone Grade”——

And you have a code word “Duqua,” which seems to be translated here, “looks like.”

A. That's right.

Q. “Case for Courts Decide Since Ceiling Taken Off [157] Unexpectedly. Nobody Knows Whether or Not Such Deal Enforceable. Offer Suggestion You Take Whatever Action Deemed Advisable.”

That telegram was sent in the regular course of business by Associated, was it not?

A. Yes, sir.

Q. And, as a matter of fact, that was the date that Associated notified Southwestern that Red Lion definitely would not ship the 10 cars of grapes, isn't that correct?

A. They made some counter offers prior to that time.

Q. Those counter offers were in connection with grapes that were not graded U. S. No. 1 with government inspection, isn't that true?

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of James P. Coyn.)

A. That's right.

Examiner Griffin: The witness did not answer the former question. I would like to have an answer, for my own information.

(The record was read.)

The Witness: That was the date on which they were told definitely that shipment would not be made.

Mr. Hoppenstein: October 16, 1944?

The Witness: That is right.

Mr. Hoppenstein: That is all.

Examiner Griffin: Are there any further questions of the witness? [158]

Cross-Examination

By Mr. Moradian:

Q. Mr. Coyn, what is the function or what is the purpose of the standard memorandum of sale?

A. The purpose or the function of it?

Q. Yes, what is it for?

A. Well, as I understand, it is a confirmation that goes to both parties to a transaction, both buyer and seller.

Q. That is required by the regulations of the Department of Agriculture, is it?

A. It is not an absolute requirement, I don't believe, but it is certainly a nice thing to have.

Q. Is it customary, before a contract is con-

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of James P. Coyn.)

cluded, to have one of those issued and turned over to each seller? A. No.

Q. Buyer?

A. No, there are a number of cases where it isn't done. We sell any number of cars where we never get a written confirmation of sale in this form.

Q. However, when one of those is issued by a broker, a copy of it is supposed to go to the seller, isn't it? A. That's correct.

Q. And, so far as you know, there was never a copy of that sent to the Red Lion Packing Company, is that right?

A. I don't know whether there was or not. [159]
Mr. Moradian: That is all.

Cross-Examination

By Mr. Hoppenstein:

Q. That memorandum correctly reflected the understanding between Associated and Southwest Brokerage, did it not?

* * *

The Witness: I don't know.

Q. (By Mr. Hoppenstein): You receive these contracts and keep them in your files under your supervision, do you not?

A. As a general thing, yes.

Q. They come to your desk, don't they?

A. That's right.

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of James P. Coyn.)

Q. When they arrive, you submit them to Mr. Crane, [160] do you not? A. No.

Q. Don't you check with him at all?

A. No.

Q. Did you raise any question with reference to the phraseology contained in that memorandum agreement? A. No, sir.

Q. As far as you know, was this agreement satisfactory to Associated?

* * *

The Witness: I don't know. These confirmations of sale that are made on a future deal don't come to me. They come to the sales department. A confirmation of sale that is made on a particular car comes to me, and I check it against the terms of sale, as designated on our sales card, but, in a case of this kind, where it is predicated on a future sale, then the confirmation does not come directly to me; it goes through the sales department. [161]

Q. (By Mr. Hoppenstein): In your investigation of the records of your office, the Associated, state whether or not you checked this memorandum against any records that you had in your files.

A. Yes, I did.

* * *

Q. I will ask you whether or not you found among any of the records of the Associated any discrepancy in the terms [162] of that line in that memorandum of agreement with Southwestern?

* * *

Plaintiffs' Exhibit No. 5—(Continued)
(Testimony of James P. Coyn.)

The Witness: No, I didn't find any discrepancies.

Q. (By Mr. Hoppenstein): Did you find any memoranda or copies of wires, telegrams or teletypes, to Associated, advising them that that memorandum of agreement was not satisfactory? [163]

* * *

The Witness: No, I didn't find anything in the file.

Mr. Hoppenstein: That is all.

Mr. Wackerbarth: That is all.

Cross-Examination

By Mr. Aynesworth:

Q. You didn't find anything in that agreement there, or anything in the records that in any way showed that Associated Fruit Distributors was an agent of the Red Lion Packing Company, did you?

A. No, I did not. [164]

* * *

Q. Did you find anything in Mr. Crane's records that would show that he was not an employee of the buyers? A. That he was not?

Q. Yes. A. No, I did not.

* * *

Q. As I noted in the telegram from Associated Fruit Distributors of California to Red Lion Pack-

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of James P. Coyn.)

ing Company, the telegram terminates in this expression:

“Will Forward Confirmation for Your Signature Soons Received Airmail From Buyers.”

Is it your understanding from that, before that contract was consummated, the Red Lion Packing Company would be forwarded a contract to sign, and would sign it, is that right?

A. No, I have no such understanding at [166] all

Q. What does that mean?

A. Well, contracts are consummated before the——

Q. Wait a minute. I read it to you. Notice the reading of it. It concludes with this:

“Will Forward Confirmation for Your Signature Soons Received Airmail From Buyers.”

Was it sought by that, that he was to have a contract and sign it in order to make that a binding obligation?

A. No, that wouldn't be my understanding at all.

Q. What was the purpose of putting that in the telegram? Do you know anything about why it was put in there?

A. He would be entitled to get a copy of the memorandum of sale.

Q. Why send it to him and tell him it was for his signature if he wasn't to have that as a part of the negotiation?

Plaintiffs' Exhibit No. 5—(Continued)
(Testimony of James P. Coyn.)

A. Most of these sales, the negotiation is completed long before the receipt of the memorandum of sale. The memorandum of sale only requires the signature of the broker. It is not signed by the buyer or seller. A standard confirmation, but not a standard memorandum.

Q. Why did Mr. Crane send that to Red Lion for their signature?

A. Mr. Crane would have to answer that. I don't know.

Q. In other words, you don't know whether or not he [167] considered that as the necessary step in order to consummate the sale or not, do you?

A. It is not a necessary step.

Q. You didn't get my question. You don't know whether or not, in the particular instance, Mr. Crane regarded that as necessary in order to get a confirmation of the sale, do you?

A. Well, I don't know what was in Mr. Crane's mind, no.

* * *

Cross-Examination

By Mr. Hoppenstein:

* * *

Q. You did find in your files a copy of a telegram from Associated to Southwestern advising that Red Lion had confirmed the sale of the 10 cars, did you not?

Plaintiffs' Exhibit No. 5—(Continued)

(Testimony of James P. Coyn.)

Mr. Wackerbarth: That is conceded in the record. Nobody questions it.

Q. (By Mr. Hoppenstein): The telegram advising that confirmation had been obtained from Red Lion, which is dated October 2nd and marked Exhibit 1 on the complaint, was sent out, I believe, according to your testimony, by a night letter, after 5:00 o'clock on October 2nd. That is correct, isn't it?

A. That's correct.

Q. And was not received in Dallas until the morning of October 3rd. That is correct, isn't it?

A. That's correct.

Mr. Wackerbarth: It says on the telegram that it was received at 8:24 a.m. on the 3rd.

Q. (By Mr. Hoppenstein): And the memorandum agreement is dated the 3rd of October, 1944, is it not?

Mr. Wackerbarth: It is. We stipulate it is.

Q. (By Mr. Hoppenstein): And the wire to Red Lion, advising that the 10 cars had been sold, was dated October 3rd, 1944, was it not? [169]

A. That's right.

Mr. Hoppenstein: That is all.

Q. (By Mr. Moradian): And the telegram in reply, from Red Lion, was dated October 4th, was it not?

Mr. Wackerbarth: That is conceded, also. [170]

Plaintiffs' Exhibit No. 5—(Continued)

DEPOSITION OF RAYMOND M. CRANE

taken on behalf of the complainants, at 405 William Fox Building, Los Angeles, California, at the hour of 3:00 o'clock p.m., on Tuesday, the 10th day of September, 1946, before Phillip W. Silver, Notary Public in and for the County of Los Angeles, State of California.

Appearances:

Commissioner:

PHILLIP W. SILVER,
405 Wm. Fox Bldg.,
Los Angeles Calif.

For Associated Fruit Distributors of California:

HENRY O. WACKERBARTH,
601 Fay Building,
Los Angeles, Calif.

Mr. Silver: Will you please show in the record that the parties present in this proceeding, in addition to Mr. Crane, Mr. Wackerbarth, and myself, was a gentleman here whose name is Coyne, who is with the Associated Fruit Distributors of California as Traffic Manager?

Are you representing Red Lion Packing Company here.

Mr. Wackerbarth: No.

Mr. Silver: Let the record show there is no ap-

Plaintiffs' Exhibit No. 5—(Continued)

(Deposition of Raymond M. Crane.)

pearance being made here for the Red Lion Packing Company.

Also show that this deposition is taken pursuant to a commission that was issued in an order that was made in this case and which was sent to me, scheduling the deposition for the 21st day of August, 1946, at the hour of 2:00 p.m., but that pursuant to stipulation entered into between Mr. Wackerbarth and myself, concurred in by Mr. Crane, this deposition was continued to this date and this hour. Is that correct, Mr. Wackerbarth?

Mr. Wackerbarth: Yes. Mr. Crane was out of the County at that time.

RAYMOND M. CRANE

produced as a witness on behalf of the complainants, pursuant to a commission issued in an order in this case, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Silver:

Q. Please state your name, address and business.

A. Raymond M. Crane. You want my business address?

Q. Yes.

A. 1231 East 7th Street, Los Angeles.

Q. What is your residence address?

Plaintiffs' Exhibit No. 5—(Continued)
(Deposition of Raymond M. Crane.)

A. 1725 El Molino, San Marino.

Q. What is your business?

A. Produce broker and distributor.

Q. What is your connection with the Associated Fruit Distributors, of Los Angeles, California?

A. Owner.

Q. During October, 1944, state whether or not you had any business transactions with Jay Margules, and the Red Lion Packing Company, Exeter, California, in connection with ten cars of United States No. 1 Emperor grapes. [3*]

A. Yes, I did.

Q. Please state in detail the dealings that you had with this transaction on or about October 2nd and 3rd, 1944, and thereafter.

A. We notified Margules of a tentative deal on some Emperor grapes and quoted him a price and stated that we thought we could get these grapes as a procuror, thought we could buy the grapes before the Red Lion Packing Company at a price, and we were to charge them \$50.00 per car to procure them. I told them we could charge the \$50.00 a car procurement or service charge for services rendered in buying the grapes from the principal.

Q. Have you answered the question in full? It said, "Please state in detail the dealings that you had with this transaction on or about October 2nd and 3rd, 1944, and thereafter."

A. Well, that was the beginning of the deal. You

Plaintiffs' Exhibit No. 5—(Continued)

(Deposition of Raymond M. Crane.)

mean the whole, specific transaction involved in the case?

Q. That is what the question means to me.

Mr. Wackerbarth: I don't want to interrupt the witness but I think I can be of help if I just tell him to mention the telegram.

The Witness: Well, I would like to put in the record the telegram of the offering, and the whole deal is right in the record as to what it was.

Mr. Silver: Maybe we will come back to that [4] question since the succeeding question mentions the telegram.

Isn't it a fact that by wire to Southwest Brokerage Company, Jay Margules, at Dallas, Texas, signed, "Associated Fruit Distributors of California," you wired as follows:

"Secured Red Lyon Packing Company Confirmation Ten Cars Grapes as Outlined You Collect Deposits to Be Forwarded to Us Soons
DUPJA Wired Each Car."

A. That is correct.

Mr. Wackerbarth: Can I interrupt again? You still haven't got the story, because there are several telegrams in these proceedings, they are all in the record. The Department of Agriculture has them but you can go into it if you want to. I have copies of them. If you don't want to go into it, don't do it.

Mr. Silver: Here is what I will do: I know

Plaintiffs' Exhibit No. 5—(Continued)

(Deposition of Raymond M. Crane.)

nothing about this case except what is set forth in these questions which I have been asked to read to you and have you reply to them. Of course, I want to be sure that I comply with my instructions and get all of your story so that we won't have to retake part of your deposition later on. I will go through the whole deposition, put all the questions to you in these written interrogatories and when I finish, if there is any material information that has not been covered, then I will propound an [5] extra question to you and have you present that so I will be sure they get all the information they want.

Is that satisfactory, Mr. Wackerbarth?

Mr. Wackerbarth: Yes.

Q. (By Mr. Silver): Please state from whom and how you received the confirmation for the sale of said ten cars concerning which you wired Southwest Brokerage Company that you had received confirmation.

A. By telephone and telegram, written to Red Lion Packing Company.

Q. The question asks, "from whom."

A. From John Kazanjian.

Q. With whom did you deal and talk to connected with Red Lion Packing Company in regard to the transaction involving the ten cars of Emperor grapes confirmed to Southwest Brokerage Company?

A. John Kazanjian.

Q. State whether or not the confirmation that

Plaintiffs' Exhibit No. 5—(Continued)

(Deposition of Raymond M. Crane.)

you received from Red Lion Packing Company, that you wired Southwest Brokerage Company, was in the regular course of your business dealings with Red Lion Packing Company and Southwest Brokerage Company, at Dallas. A. Yes.

Q. State whether or not you received your confirmation from Red Lion in writing or if the same was verbal and, if verbal, how and with whom you talked. [6]

A. Received it in a telegram and it was signed, "Red Lion Packing Company," as I recall.

Q. State whether or not Red Lion Packing Company, in the regular course of its business dealings, in connection with the ten cars of United States No. 1 Emperor grapes, authorized and empowered you to consummate the sale of the grapes to Southwest Brokerage Company, at Dallas, Texas.

A. I don't think that question is quite right. They didn't empower me. They confirmed for the account of the buyer. They did confirm the sale, however, confirmed the transaction by wire.

Q. State whether or not you would have wired confirmation to Southwest Brokerage Company if you had not received authorization from Red Lion Packing Company. A. No, sir.

Q. When did you first learn that Red Lion Packing Company refused to carry out its contract and make delivery?

A. When was that? I don't recall the exact date. I would say about October 9th.

Plaintiffs' Exhibit No. 5—(Continued)
(Deposition of Raymond M. Crane.)

Q. What year? A. 1944.

Q. Isn't it a fact that Associated Fruit Distributors of California wired Southwest Brokerage Company, at Dallas, Texas, on or about October 12, 1944, as [7] follows:

"As Final Gesture and Endeavoring to Amicably Settle Grape Contract Red Lion Packing Company Willing Sell Basis 3.00 Net FOB Quantities Specified on Contract Buyer to Pay Us .10 Pkge Procurement Quality Is Nice Uninspected Fieldrun but Red Lion States in All Probability Fruit Easily Grade Usone Arrival but Not Willing Make This Guarantee Our Inspector Has Seen Fruit Says Really Beautiful if Buyers Wish We Will Arrange to Put Cars Storage Which We Have Already Under Contract Otherwise Red Lion Takes Attitude That After All He Had Nothing to Do With Ceiling Feels He Relieved All Moral Responsibility by Making This Offer Claims Turning Down Offers His Entire Outfit Today Basis 3.40 Cash FOB."

A. Right.

Q. Isn't it a fact that Associated Fruit Distributors of California wired Southwest Brokerage Company, at Dallas, after October 12, 1944, as follows:

"Again Talked Red Lion. They State Definitely Unwilling Abide Any Sales Made Where

Plaintiffs' Exhibit No. 5—(Continued)

(Deposition of Raymond M. Crane.)

Ceiling Definite Consideration. Furthermore, Crop Short, Not Packing Usone Grade DUQUK. Case for Courts Decide. Since Ceiling Taken Off Unexpectedly Nobody Knows Whether or Not Such Deal Enforcable. Offer Suggestion You Take Whatever Action Deem Advisable."

A. Right.

Q. Isn't it a fact that on or about December 10th and 11th, 1944, and after Red Lion Packing Company refused to make delivery of ten cars of grapes, the reasonable cash market value of United States No. 1 Emperor grapes was in the neighborhood of \$4.00 per lug? [8]

A. Yes, I would say that is approximately right.

Q. Isn't it a fact that on or about December 9, 1944, Associated Fruit Distributors of California issued a bulletin quoting Emperor grapes at \$4.15 f.o.b. net, f.o.b. acceptance final?

A. We offered those subject to confirmation at a general market at that particular time, yes.

Q. Please explain.

A. Well, we sent out a weekly market bulletin which indicates market trends. It has nothing to do relative to specific quotations and it might apply to prices at which we could buy at a given period from various different packers.

Q. Does that explain it fully? A. Yes.

Q. Isn't it a fact that a bulletin dated Decem-

Plaintiffs' Exhibit No. 5—(Continued)

(Deposition of Raymond M. Crane.)

ber 9, 1944, from Associated Fruit Distributors of California was circulated to the fruit and vegetable trade throughout the country, quoting, among other items, a reasonable market price of \$4.15 f.o.b. net per lug? A. Yes.

Q. Based upon your experience in the fruit and vegetable business, please state what, in your opinion, was the fair reasonable cash market value of United States No. 1 Emperor grapes on or about December 10th and 11th, 1944, and the period between October 3, 1944, and [9] December 10, 1944.

A. That can't be answered by reason of the fact that I think that during the earlier period ceilings were applicable which would have no relative bearing to market judgment or nothing to do in relation to the value of the grapes. However, the market at a later date, in the December that you mentioned, the market was around \$4.00. See what I mean? In other words, you can see that a man uses his business judgment when ceilings are in effect.

Q. The question asks for a "fair reasonable cash market value" between the period I mentioned, and that is the ceiling price of the market, isn't it?

A. When it is on ceiling, for instance, then it is \$3.00.

Q. Then that is the market value, isn't it, if it is the ceiling price?

A. Well, you couldn't tie that in with a man's judgment as to what the value was at that par-

Plaintiffs' Exhibit No. 5—(Continued)

(Deposition of Raymond M. Crane.)

ticular period. There wasn't any question of anybody's judgment. That was the ceiling.

Q. Was that ceiling enforced throughout that period, October 3, 1944, and December 10, 1944?

A. As I recall it was in effect in October but I don't think it was in effect in December.

Q. Isn't it a fact that grapes were scarce [10] and because of the market conditions it was difficult to obtain grapes for replacement of the ten cars on which Red Lion Packing Company repudiated its agreement?

A. I would say grapes were scarce only by reason of the fact that there was a ceiling price existing at that time.

Q. Isn't it a fact that on or about December—

Mr. Wackerbarth: Wait a minute. He hasn't answered whether or not it was difficult to obtain grapes for replacement.

The Witness: No, I don't think it was difficult to obtain grapes for replacement.

Q. (By Mr. Silver): Isn't it a fact that on or about December 11, 1944, Associated Fruit Distributors of California wired, by Western Union, to Jimmie Teel, Fort Worth, Texas, as follows:

“Referring to Our Circular of the 9th Not
Sure but Think Owner Willing Confirm 4.00
Emperors Subject Immediate Reply. Offer
Subject Packers Confirmation Crossed Satur-
day Mexicanita Brand No. 2 Mexican Toma-
toes 125 6/6 3.50 365 6/7 3.00 7/7 2.50 Duty

Plaintiffs' Exhibit No. 5—(Continued)
(Deposition of Raymond M. Crane.)

Paid Border FOB Acceptance Final Duty
Crossing Extra 61139."

A. Yes.

Q. Isn't it a fact that the agreement to sell the ten cars of grapes confirmed by you to Southwest Brokerage Company, at Dallas, Texas, was made in good faith and in the regular course of business and that you expected Southwest Brokerage Company to rely upon your wire of [11] confirmation?

A. Right.

Q. Isn't it a fact that the ten cars of grapes involved in the transaction with Southwest Brokerage Company and Central Fruit & Vegetable Company and West Texas Produce Company was intended to be shipped in Interstate Commerce?

A. Yes.

Q. Isn't it a fact that the standard lug pack per carload of grapes is 1105 lugs?

A. Not necessarily.

Q. Please explain in detail your answer.

A. The number of lugs consisting of a standard carload depends on ODT regulations, or did at that time, and the size of the car.

Q. Isn't it a fact that the Red Lion Packing Company declined to make delivery of the ten cars of Emperor grapes confirmed by you to Southwest Brokerage Company? A. Yes.

Q. Was the party with whom you negotiated for these grapes and obtained confirmation from Red Lion Packing Company acting in the regular course

Plaintiffs' Exhibit No. 5—(Continued)

(Deposition of Raymond M. Crane.)

of his business and employment for and on behalf of Red Lion Packing Company at the time you obtained confirmation of the sale of the ten cars of United States No. 1 [12] Emperor grapes?

A. As far as I know, yes.

Q. Will you please furnish the Reporter taking your deposition copies of any and all letters and wires you have received or sent to Red Lion Packing Company in connection with the transaction involving the ten cars of United States No. 1 Emperor grapes confirmed by you to Southwest Brokerage Company?

A. Yes.

Mr. Wackerbarth: They are photostats. The originals are probably in Washington.

There are two there, one to Red Lion and the other one from Kanzanjian to Associated Fruit Distributors.

(The witness handed the reporter one photostatic sheet consisting of the two above-mentioned wires.)

Mr. Silver: Mr. Crane, coming back to this question No. 4, the question, referring to your business transactions with Jay Margules and the Red Lion Packing Company in connection with ten cars of United States No. 1 Emperor grapes, the question was: "If you have answered the foregoing question in the affirmative, please state in detail the dealings that you had with this transaction on or about October 2nd and 3rd, 1944, and thereafter."

Plaintiffs' Exhibit No. 5—(Continued)
(Deposition of Raymond M. Crane.)

Will you please state if there are any further dealings that you had with this transaction other than [13] as heretofore has been testified by you?

A. No. I think that this covers all of it in relation to this transaction. There is no other testimony we can add.

Mr. Wackerbarth: It would clarify that a good deal if you would state that you sent out this feeler to a group of some thirteen brokers' houses and it was what initiated the deal. You have beat around the bush but you haven't said how it started.

Q. (By Mr. Silver): Will you explain that?

A. I will state that the Associated Fruit Distributors offered this prospective block of grapes to thirteen of our different brokers or representatives whom we worked with in terminal markets in the regular course of business, and that we subsequently received an order to buy from the Southwest Brokerage Company for the account of West Texas and—who was the other buyer there?

Mr. Wackerbarth: Central Fruit?

The Witness (Continuing): Central Fruit.

I would like to add the telegram sent out to various brokers, known as the one of September 26, 1944, is copied in the report of investigation on this case, dated April 3rd, 1946.

Mr. Silver: Do you want to hand the Reporter the documents you were just describing? [14]

The Witness: Yes, here it is.

Plaintiffs' Exhibit No. 5—(Continued)
(Deposition of Raymond M. Crane.)

(The witness handed the reporter two large photostatic copies of Western Union telegrams.)

Mr. Silver: Mr. Reporter, would you kindly make photostatic copies of these photostats and attach the photostatic copies you obtain to the various copies of the deposition you write up?

Mr. Wackerbarth, do you have any questions either in writing or orally that you wish to propound to Mr. Crane in addition to what I have propounded to him?

Mr. Wackerbarth: There are no questions. Mr. Crane has presented the whole case, as I see it, in answer to your interrogatories, and the answers which he has given to the questions present the defense which Mr. Crane is relying upon, to wit, that he was the procuring agent of the Central Fruit and Vegetable Company and the West Texas Produce Company, and that he was not the agent of the Red Lion Packing Company.

Q. (By Mr. Silver): Has your attorney stated accurately your defense? A. Yes.

Q. Mr. Crane, according to the certificate which was sent to me appointing me as the Commissioner to take your deposition, it is provided in the certificate that this deposition, after being written up, be subscribed by you in my presence. In view of that fact, I will ask [15] you to appear in my office with your attorney as soon as this deposition is

Plaintiffs' Exhibit No. 5—(Continued)
(Deposition of Raymond M. Crane.)

written up and when it is convenient for you to do so for the purpose of having you sign the deposition in my presence.

Is that satisfactory? A. Absolutely.

/s/ RAYMOND M. CRANE,
Witness. [16]

Exhibit No. 1

Western Union

BQ LOSA Night Book, Sept. 26, 1944.

1. Southwest Bkge Co., Dallas Tex.
 2. Jimmie Teel, Fort Worth, Tex.
 3. Apfel and Brooks Co., San Antonio, Tex.
 4. Texas Distributing Co., Houston, Tex.
 5. Eubank Brokerage Co., Waco, Tex.
 6. David M. Slaughter, Laredo, Tex.
 7. A. B. Rains, Jr., Louisville, Ky.
 8. Acme Brokerage Co., Charlotte, N. C.
 9. Pearce, Young, Angel Co., Inc., Spartanburg, SCar.
 10. McCubbins Brokerage Co., Oklahoma City, Okla.
 11. Interstate Brokerage Co., Tulsa, Okla.
 12. C. H. Tefft and Son, Charlie Tefft, New Orleans, La.
 13. H. N. Brown Brokerage Co., Denver, Colo.
- Can Book Emperors Nine Cars USONE Nine Cars Unclassified or 18 Cars Vineyard-Run Grade

Plaintiffs' Exhibit No. 5—(Continued)

to Go Into Storage Packing to Commence Rate of One or Two Daily October 9th We to Personally Inspect AFOHD^[1] Basis Our Inspection Shipper to Transfer Title on or After December 10th He Paying All Storage Charges. Packed 28# Net Display New Lugs Lidded CalRipe or Comparable Brand 500.00 Part Payment With Confirmation Price 2.53 Net to Shipper Which Ceiling That Time We Charging 50.00 Car Procurement Charge ADLAM^[2] CORLU^[3] Thursday.

ADLAS Immediate UPTMV New Crop Edison District ALBIQ 3.25 Can Secure 3-4 Cars Uninspected Account Running Heavy Puff Heavy Sidewalls Would Grade ALBIEIQ Except for Puff Which Not Serious Defect Account XXX Account Heavy Sidewall 2.50.

ASSOCIATED FRUIT DISTRIBUTORS OF CALIF.

527P

S 13BQ

Exhibit No. 3

Western Union

BQ LOSA SER Book AOXX, Oct. 2, 1944.

1. Southwest Brokerage Co., Dallas, Tex.
2. Jimmie Teel, Fort Worth, Tex.

^[1]FOB acceptance final.

^[2]Offer subconfirmation.

^[3]Wire immediately. Must have answer by.

Plaintiffs' Exhibit No. 5—(Continued)

3. Apfel and Brooks Co., San Antinxx, Antonio, Tex.
 4. Texas Distributing Co., Houston, Tex.
 5. Eubank Brokerage Co., Waco, Tex.
 6. David M. Slaughter, Laredo, Tex.
 7. A. B. Rains, Jr., Louisville, Ky.
 8. Acme Brokerage Co., Charlotte, N. C.
 9. Pearce, Young, Angel Co., Inc., Spartanburg, SCar.
 10. McCubbins Brokerage Co., Okla City, Okla.
 11. Interstate Brokerage Co., Tulsa, Okla.
 12. C. H. Tefft and Son, Charlie Tefft, New Orleans, La.
 13. H. N. Brown Brokerage Co., Denver, Colo.
- CPFGP^[1] Quoting Futures Emperors Secured
 Revised Deal Fifteen Cars USONE 2.50 Net Same
 Deal CORSD^[2] Any Part.

ASSOCIATED FRUIT DIS-
 TRIBUTORS OF CALIF.

910A

S13BQ

T

RBQ1-13 SB 916A TNX

^[1]Reference to our nite letter of 26th.

^[2]Wire quick if wanted.

Plaintiffs' Exhibit No. 5—(Continued)

Exhibit No. 7

Western Union

BQ LOSA LG SER Fruit, Oct. 3, 1944

Red Lyon Packing Co.

Exeter, Calif.

Referring Telephone Have Sold for Your Account Basis 2.50 Lug Net to You Block Emperors Mentioned Five Cars Basis 750.00 Car Deposit Ten Cars Basis 1000.00 Deposit to Be Paid Upon Receipt USONE Government Inspections Now Depending You Handle Through Us Balance Cars You Mentioned for Fresh Shipment Advise When Expect Ship These Believe We Could Place Them Now Ceiling PRICDXXX Price With Deposits Selling Basis Ability Make USONE Grade Suggest Give Us Approximate Shipping Dates Mays Well Get Cleaned Up Since Ceiling Precludes Any Possibility Higher Market Time of Shipment Will Forward Confirmations for Your Signature Soons Receive Airmail From Buyers.

ASSOCIATED FRUIT DISTRIBUTORS OF CALIF.

925A

S2BQ

Plaintiffs' Exhibit No. 5—(Continued)

SL 58 77

Exhibit No. 8

Western Union

Exeter, Calif, Oct. 4, 1944. 11OP

Associated Fruit Distributors

Fifteen Cars Storage U. S. One Emperors December Tenth Conversion Satisfactory at Two Dollars and Fifty Cents FOB Exeter Guaranty by Buyer. One Thousand Dollars Deposit on 10 Cars and Seven Hundred Fifty Dollars on Five Cars Said Deposit to Be Paid Immediately on Inspection at Shipping Point. You to Arrange for Storage as Agreed. Balance of Pack Intend to Load After Oct. Twentieth Will Be Glad to Make Deal on Same About the 15th of Oct.

JOHN C. KAZANJIAN.

150PM

US FOB 10:15 KAZANJIAN

State of California,
County of Los Angeles—ss.

I, Phillip W. Silver, Notary Public in and for the County of Los Angeles, State of California, do hereby certify:

That on the 30th day of October, 1946, before me personally appeared Raymond M. Crane, the witness whose deposition appears hereinbefore.

That the said witness was by me duly advised of the right to make such changes and corrections in

Plaintiffs' Exhibit No. 5—(Continued)

the within transcript as might be necessary in order to render the same true and correct;

That the said witness stated to me that the said deposition had been read to or by him, and he, having made such changes and corrections as he desired thereupon, subscribed and swore to the said deposition in my presence;

In Witness Whereof, I have hereunto subscribed my name and affixed my seal of office the date hereinabove written.

/s/ PHILLIP W. SILVER,

Notary Public in and for the County of Los Angeles, State of California.

Certificate

I, James P. Pino, do hereby certify:

That the foregoing proceedings were taken down by me in stenotypy as given at the time and place herein named and it was thereafter transcribed into typewriting under my direction, and I hereby certify that the foregoing 18 pages comprise a full, true, correct and impartial transcript of my said stenotype notes.

/s/ JAMES P. PINO,

Stenotype Reporter.

Certificate

I, Phillip W. Silver, appointed to take the testimony of Raymond M. Crane whose name is subscribed to the attached deposition, hereby certify

Plaintiffs' Exhibit No. 5—(Continued)

that on the 10th day of September, 1946, at the place and date specified in said order the said Raymond M. Crane was first sworn by me to testify to the truth in relation to the matters in controversy between the said Central Fruit & Vegetable Co. & West Texas Produce Company complainant, and the said Associated Fruit Distributors of Calif., and Red Lion Packing Co., respondent; that the testimony of said witness was reduced to writing and was thereafter subscribed by the said Raymond M. Crane in my presence.

In testimony whereof I have hereunto set my hand and seal this 30th day of Oct., 1946.

[Seal] /s/ PHILLIP W. SILVER,
Notary Public.

JAY MARGULES

the said witness, being duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth in answer to the direct interrogatories as hereinafter indicated, deposes and says as follows:

Direct Interrogatories

Q. Please state your name, business and address?

A. Jay Margules; 202 Producers Exchange Building; fruit and vegetable broker.

Q. Are you licensed by the Department of Agriculture, and if so, please give your license number?

A. Yes, 50847.

Plaintiffs' Exhibit No. 5—(Continued)

(Deposition of Jay Margules.)

Q. Please describe the nature of the operations of your business and the number of years of experience you have had in the same?

A. I sell carloads of fruit and vegetables and have had approximately twenty years experience.

Q. Have you had business dealings with the Complainants, Central Fruit & Vegetable Company and West Texas Produce Company, and if so, over what period of years?

A. Yes, for at least twelve to fifteen years.

Q. Have you had business transactions prior to October 3, 1944, with Associated Fruit Distributors of California and Red Lion Packing Company?

A. I have had business transactions with the Associated Fruit Distributors prior to October 3rd, 1944, but not the Red Lion Packing Company.

Q. Are you acquainted with the Respondents, Associated Fruit Distributors of California and Red Lion Packing Company, and if you are, please state with whom you have had business transactions and over what period of time, and whether the same included the period about October 3rd, 1944?

A. I am acquainted with Respondent, Associated Fruit Distributors but not the Red Lion Packing Company, and most of my transactions took place with Mr. Ray Crane over a period of possibly three or four years. This including the period about October 3rd, 1944.

Q. Please state whether or not you had any transactions with the Complainants, Central Fruit

Plaintiffs' Exhibit No. 5—(Continued)

(Deposition of Jay Margules.)

& Vegetable Company and West Texas Produce Company, and Respondents, Associated Fruit Distributors of California and Red Lion Packing Company, in connection with the sale and purchase on or about October 3, 1944, of ten (10) cars of United States No. 1 Emperor grapes, 28 pounds net per lug, grade to be evidenced by grade inspection at the agreed price of \$2.50 per lug, f.o.b. shipping point, plus 3½c per lug brokerage to be paid to you, plus \$50.00 per car buying service.

A. Yes, with the exception of the Red Lion Packing Company. My dealings were with Mr. Crane of the Associated Fruit Distributors. He confirmed the ten cars of grapes in question by Western Union Telegram at the agreed price of \$2.50 per lug F.O.B. shipping point plus \$50 per car buying service for his firm plus three and one-half cents per lug brokerage for myself to be paid by the buyers.

Q. If you have answered the foregoing interrogatory in the affirmative, please state in detail the dealings that you handled personally in connection with the aforementioned transaction, furnishing to the Reporter taking your deposition copies of any telegrams, letters or instruments you received from either the Complainants or Respondents, or any that you sent to the Complainants and Respondents?

A. On or about October 1st or 2nd, 1944, Associated Fruit Distributors wired us that could book

Plaintiffs' Exhibit No. 5—(Continued)

(Deposition of Jay Margules.)

some Emperor Grapes which were rather scarce at that time and we eventually sold ten cars at \$2.50 per lug F.O.B. shipping point plus \$50 buying service for Associated Fruit Distributors plus three and one-half cents per lug brokerage to be paid us by the buyers. Six of these cars were to go to the West Texas Produce Company, Fort Worth, and four to the Central Fruit & Vegetable Company at Dallas. All particulars of the shipper's specifications were met at the time and written confirmation issued to both buyers and the seller. On October 10th, 1944, we heard that the ceiling on grapes had been lifted, and we wired Associated asking if he could ship some of these cars right away instead of putting them all in storage. He replied that the owner, Red Lion Packing Company took the view that "Account ceiling lifted, any contracts Emperor voided; willing go along; give you trade preference shipping as packed at market price which today \$3.25 F.O.B. acceptance. Advise." This was seventy-five cents per lug higher than the cars were originally sold and confirmed.

We then contacted Mr. T. C. Curry, Principal Marketing Specialist of the Department of Agriculture at Washington, D. C., giving the facts in the case as best we could by wire, and he replied on October 11th that, "Based on facts presented would appear California shipper obligated delivery ten cars Emperor, \$2.50 F.O.B. Don't see where lift-

Plaintiffs' Exhibit No. 5—(Continued)

(Deposition of Jay Margules.)

ing OPA ceiling has any effect on contract of this kind."

After contacting West Texas Produce and Central Fruit & Vegetable Company we wired the Associated Fruit Distributors that the buyers wanted their grapes as bought and confirmed and would hold them and the Red Lion Packing Company liable for damages if they did not deliver the grapes per contract.

Mr. Crane requested me to call him on the telephone, which I did, but about all he told me on the telephone was that the Red Lion Packing Company would not go through with the deal any other way except by billing the cars at market price, and that the Red Lion Packing Company felt they were doing the buyers a favor to sell them even on that basis.

On October 12th, 1944, Associated Fruit Distributors wired me that the Red Lion Packing Company had made a final gesture and would ship these grapes basis \$3.00 F.O.B., stating that "Quality is nice, uninspected, field run, but Red Lion states probable grade U. S. No. 1 arrival but not willing make this guarantee." We had originally bought these grapes on the basis of U. S. No. 1 grade. We then wired the Red Lion Packing Company direct on October 13th, 1944, stating that their offer through the Associated to deliver these grapes for \$3.00 F.O.B. was unacceptable and the buyers wanted the contract fulfilled as confirmed.

Plaintiffs' Exhibit No. 5—(Continued)
(Deposition of Jay Margules.)

On October 16th, we received a wire from Associated that the Red Lion Packing Company definitely was unwilling to abide by the terms of the original contract and suggesting that we take whatever action we felt advisable.

I sent the original papers relating to this transaction, to the best of my recollection, to Mr. T. C. Curry of the Department of Agriculture, Washington, D. C.; instead of attaching copies of all letters, telegrams, instruments, and so forth, I refer to Exhibits 12, 13, 13-A, 13-B, 13-C, 13-D, 13-E, 13-F, 13-G, 13-H, 13-I, 13-J, 13-K, 13-L, 13-M, 13-N, 13-O, 13-P, 13-Q, and 13-R attached to the report of the investigation before the Secretary of Agriculture pertaining to this matter made by T. C. Curry in charge Regulatory Division Fruit & Vegetable Branch, and say that the photostatic copies of the said exhibits are true and correct, and refer to them as part of my answer.

I do attach a photostatic copy of my confirmation memorandum of sale to West Texas Produce Company, Fort Worth; Central Fruit & Produce, Dallas, which is the same as Central Fruit & Vegetable Company. This copy is being marked for identification by the reporter as Exhibit "A."

Q. Please state the capacity in which you participated in the transaction involving the aforementioned ten (10) cars of United States No. 1 Emperor grapes?

A. I represented The Associated Fruit Distrib-

Plaintiffs' Exhibit No. 5—(Continued)
(Deposition of Jay Margules.)

utors in this transaction in the regular course of my business as a broker, but the agreement was that my compensation was to come from the buyer, together with \$50 buying service for Associated Fruit Distributors.

Q. Please state whether or not such grapes were to be sold, delivered and handled in Interstate Commerce, that is, from passing through one state to another? A. Yes.

Q. Please state whether or not you received any wires from the Respondent, Associated Fruit Distributors of California, with reference to the sale of the aforementioned grapes?

A. Yes, a wire confirming the sale on the terms that I made to Central Fruit & Vegetable, and the West Texas Produce Company, and the other wires referred to in my answer to question 8.

Q. Please state whether or not you confirmed in writing the sale of the aforementioned grapes to the Complainants, Central Fruit and Vegetable Company and West Texas Produce Company?

A. Yes. I issued a written confirmation of sale to both buyers and the Associated Fruit Distributors.

Q. If you have answered the foregoing in the affirmative, please furnish the Reporter a copy of such confirmation and state whether the same is an exact copy?

A. I have already done so in answer to question 8. It is marked Exhibit "A."

Plaintiffs' Exhibit No. 5—(Continued)

(Deposition of Jay Margules.)

Q. I show you a photostatic copy of a letter dated February 21, 1946, which I will ask the Reporter to identify as Plaintiff's Exhibit No. 1, addressed to Mr. T. C. Curry, Principal Marketing Specialist, Washington, D. C., on the stationery of Southwest Brokerage Company, signed "Southwest Brokerage Company J. Margules," and ask you to state whether or not that is a correct and true photostatic copy of the original of the letter that you wrote Mr. Curry, and if the same correctly discloses your participation in the transaction and whether or not all of the facts therein contained are true and correct?

A. Yes, Exhibit No. 1 displayed to me by the reporter. This is a true and correct photostatic copy of the original of the letter which I wrote to Mr. Curry, and to the best of my knowledge discloses fully my participation in the transaction and, to the best of my knowledge, all the facts contained therein are true and correct.

Q. Did you have any telephone conversations with anyone connected with the Associated Fruit Distributors of California, and if so, please state with whom, the approximate time, and what you said and what the Associated Fruit Distributors of California representative said. If you have any written memoranda of such conversations, please state if you made the same and furnish the Reporter with two copies thereof?

A. Yes. I had a telephone conversation with

Plaintiffs' Exhibit No. 5—(Continued)

(Deposition of Jay Margules.)

Ray Crane of the Associated Fruit Distributors on or about October 11th, 1944, at which time he stated the Red Lion Packing Company definitely would not go through with the deal any other way except at market price, and, to the best of my knowledge, I talked to Mr. Ray Crane on or about October 2nd, 1944, wherein the deal for the ten cars was consummated and at that time he stated he would follow up with a wire consummation. This wire consummation was later received and is referred to among the exhibits. I do not have any written memorandum of such conversation.

Q. Please state whether or not the letter you wrote to Mr. T. C. Curry on February 21, 1946, was in response to a request for such information from Mr. Curry and was in the regular course of business and in transactions with the Department of Agriculture?

A. Yes. A letter written to Mr. Curry on February 21st, 1946, was in response to his request for said information.

Q. State whether or not you received from the Associated Fruit Distributors of California a Western Union Telegraph Company wire confirming the ten (10) cars of grapes in question on or about October 22, 1944?

A. Yes. I did receive a Western Union Wire confirming the ten cars of grapes in question, but the date was on or about October 2nd, 1944.

Q. If you have answered the foregoing inter-

Plaintiffs' Exhibit No. 5—(Continued)

(Deposition of Jay Margules.)

rogatory in the affirmative, will you please deliver to the Reporter, to be marked for identification as Exhibit No. 2, a true and correct copy of such wire?

A. I deliver to you a photostatic copy of the wire referred to which you will please mark as Exhibit No. 2 and I certify this to be a true and correct copy of said wire.

Q. I show you a standard Memorandum of Sale, dated October 3, 1944, to West Texas Produce Company and Central Fruit & Produce, which I will ask the Reporter to identify as Exhibit No. 3, and ask you to state whether or not that is a true and correct photostatic copy of the Memorandum of Sale that you delivered to the Complainants?

A. I have already covered this in previous question 8 and it is a true and correct copy.

Q. State whether or not that is your signature on the aforementioned memorandum of sale?

A. Yes. This is my signature.

Q. At the time you delivered said Memorandum of Sale, above referred to, had you been authorized to so do by Associated Fruit Distributors, and if so, state how and when?

A. Yes, by the wire confirming the sale.

Q. Was the Memorandum of Sale delivered to the Complainants over your signature in your usual course of business and dealings as a broker?

A. Yes.

Plaintiffs' Exhibit No. 5—(Continued)
(Deposition of Jay Margules.)

Q. Had you had previous dealings with the Associated Fruit Distributors and was the manner in which you handled this transaction the usual and customary manner of your dealings with the Associated Fruit Distributors and the Complainants?

A. Yes.

Q. To your knowledge, have the Complainants been ready, willing and able to comply with the agreement to purchase the ten (10) cars of United States No. 1 Emperor grapes at the price contracted for?

A. Yes.

Q. To your knowledge, have the Respondents complied with the agreement and made delivery of the grapes in question?

A. No.

Q. To your knowledge, have the Complainants and you, in behalf of the company, attempted to minimize the damage and purchase ten (10) cars of United States No. 1 Emperor Grapes to replace the grapes not delivered by the Respondents?

A. Yes.

Q. Isn't it a fact that the market on grapes was scarce and no confirmations could be obtained by you for ten cars of grapes of the kind and character contracted for?

A. Yes.

Q. Please state the efforts you have made to locate and obtain the purchase of ten cars of grapes after receiving notice that the Respondents declined to comply with the agreement and sale?

A. I wired other shippers whom I knew to be

Plaintiffs' Exhibit No. 5—(Continued)

(Deposition of Jay Margules.)

handling grapes, but to the best of my recollection, I could not secure any.

Q. I show you a photostatic copy of a bulletin from the Associated Fruit Distributors of California dated December 9, 1944, and ask you whether or not you received a mimeographed bulletin of like character, quoting United States No. 1 grapes at \$4.15 f.o.b. net?

A. Yes. I did receive the bulletin referred to which I hand to the Notary to be marked as Exhibit 3.

Q. Please deliver to the Reporter taking this deposition all correspondence and telegrams that you have in connection with the transaction concerning the ten cars of United States No. 1 grapes sold to the Complainants herein.

A. For answer to this question I refer to the exhibits mentioned in my answer to question No. 8.

Q. From your experience in the fruit and vegetable business, please state what the fair, reasonable cash market value of United States No. 1 Emperor grapes of the type and kind contracted for with the Complainants, was on or about December 10, 1944; and the period between October 3, 1944, and December 10, 1944, and for a reasonable period after December 10, 1944.

A. On or about December 10th, 1944, the fair and reasonable fair cash market value of U. S. No. 1 Emperor Grapes was around \$4.00 to \$4.25 F.O.B. shipping point. Between October 3rd,

Plaintiffs' Exhibit No. 5—(Continued)

(Deposition of Jay Margules.)

1944, and December 10th, 1944, to the best of my recollection, the market ranged from \$3.25 to \$4.25 F. O. B., and for a reasonable period after December 10th, 1944, if the grapes were available they were worth not less than \$4.25 F.O.B. or U. S. No. 1 of the type and kind contracted for with the complainants.

Q. State whether or not you purchased for Complainants any United States No. 1 Emperor grapes of the type and kind contracted for with the Complainants, for the Complainants, between October 3, 1944, and February 1, 1945. If so, please give all details, amount purchased, and price paid for the same.

A. To the best of my recollection I did purchase one car from Heggblade-Margules at San Francisco, California, for the Central Fruit & Vegetable Company at a much higher price than the ten cars were originally bought. To the best of my recollection this car which I bought for Central Fruit & Vegetable Company was at a cost of around \$3.75 F.O.B. on October 24th, 1944.

Q. To your knowledge, have Complainants made diligent effort to find, locate and purchase ten cars of United States No. 1 Emperor grapes for delivery on or about December 10, 1944, to replace the grapes not delivered by the Respondents?

A. Yes.

Q. State whether or not any agreement was made by you with Complainants or Respondents

Plaintiffs' Exhibit No. 5—(Continued)

(Deposition of Jay Margules.)

that lifting of O.P.A. ceiling prices would void contract for the ten cars of United States No. 1 Emperor grapes. A. No.

Q. I hand you copy of telegram addressed to Southwest Brokerage Company from T. C. Curry, War Food Administrator, which I will ask the Reporter to identify as Exhibit 4, and ask you whether or not this is a true and correct copy of the telegram which you received from Mr. Curry?

A. I hand you copy of telegram referred to and state that this is a true and correct copy of the telegram which I received from Mr. Curry, which is marked Exhibit 4.

Q. I hand you copy of telegram addressed to Southwest Brokerage Company from Associated Fruit Distributors of California, which I will ask the Reporter to identify as Complainant's Exhibit No. 5, and ask you whether or not this is a true and correct copy of a telegram you received from Associated Fruit Distributors of California?

A. I hand you copy of telegram addressed to me from the Associated Fruit Distributors and state that this is a true and correct copy of said telegram which you will mark as Exhibit No. 5.

Q. I hand you fourteen (14) copies of telegrams, which I will ask the Reporter to identify as Complainants' Exhibits Nos. 6 through 19, and ask you whether or not these are true and correct copies of telegrams you received and sent in connection with the transaction involving the ten cars

Plaintiffs' Exhibit No. 5—(Continued)
(Deposition of Jay Margules.)
of United States No. 1 Emperor grapes confirmed
to the Complainants herein?

A. Yes, said exhibits being marked 6 to and including 19.

Q. It is a fact, is it not, that Dallas, Texas, is more than 100 miles from Los Angeles, California?

A. Yes.

Q. Were you willing at your own expense to go to Los Angeles, California to testify in this cause?

A. I would not have liked to go.

[Interrogatories submitted by]:

/s/ J. MANUEL HOPPENSTEIN,
Attorney for Complainants.

[Answers to Interrogatories by]:

/s/ JAY MARGULES.

Subscribed and sworn to before me by the said witness, Jay Margules, on this the 8th day of Oct., 1946.

[Seal] /s/ L. W. McCREIGHT,
Notary Public in and for
Dallas County, Texas.

Plaintiffs' Exhibit No. 5—(Continued)

Exhibit No. 1

Southwest Brokerage Co.
Fruit and Vegetable Division
Room 202 Produce Exchange Building
2103 1-2 Cadiz Street
Dallas, Texas

February 21, 1946.

Mr. T. C. Curry
Principal Marketing Specialist
Washington, D. C.
PACA D-2468

Dear Sir:

Referring yours of February 8th we are enclosing herewith all the papers in our file with regard to this deal. When they have served your purpose please return them to us.

To the best of our recollection, the following is a true and complete statement of the facts as known to us: Associated wired us they could book some Emperors, which were rather scarce at that time, and we eventually sold 10 cars at \$2.50 per lug to West Texas Produce Company, Fort Worth, and the Central Fruit at Dallas, the former to get 6 cars and the latter to get four cars. All particulars of the shipper's specifications were met at the time and confirmation issued to both buyers and seller, copy of which is attached. On October 10th, 1944, we heard the grape ceiling had been lifted and we wired the shipper asking if he could ship some of these cars right away instead of putting them all in

Plaintiffs' Exhibit No. 5—(Continued)

storage. He replied that the owner (Red Lyon Packing Co.) took the view that "account ceiling lifted any contracts emperors voided willing go along give your trade preference shipping as packed at market price which today 3.25 f.o.b. acceptance advise." This was 75c per lug higher than the cars were originally bought.

We then contacted you and presented the facts as best we could by wire and you replied on October 11th that "based on facts presented would appear California shipper obligated delivered 10 cars emperors 2.50 f.o.b. don't see where lifting OPA ceiling has any effect on contract this kind." After contacting our buyers we wired Associated that the buyers wanted their grapes as bought and would hold him and the owner liable if not delivered. He requested me to call him, which I did, talking to Ray Crane, owner or manager of Associated and about all he told me on the phone was that the owner would not go thru with the deal any other way except market price, and felt he was doing the buyers a favor to sell them even on that basis. On October 12th, 1944, Associated wired that the owner had made a final gesture and would sell basis \$3.00 f.o.b., "quality is nice uninspected field run but Red Lyon states probably grade U.S. No. 1 arrival but not willing make this guarantee." We had originally bought U. S. No. 1. We then wired Red Lyon on October 13th, 1944, that the offer of \$3.00 f.o.b. was unacceptable and buyers wanted contract fulfilled as confirmed. On October 16th we received a wire from Associated that Red Lyon definitely

Plaintiffs' Exhibit No. 5—(Continued)

was unwilling to abide by the original deal, suggesting we take whatever action we felt advisable.

I have had many years experience in the brokerage business and during the period involved was qualified to know the reasonable fair cash market value of the type of grapes involved in the transaction. I know that at the time required by the contract for the delivery of the grapes to the purchasers and after they discovered that the shipper would not deliver, that the purchasers made bona fide efforts to purchase ten cars of Emperor U. S. No. 1, but were unable to obtain offers of sale for such a quantity, but that they did purchase several cars. Based upon my experience in the fruit and vegetable business and inquiries made of the trade, it is my opinion that the fair cash reasonable market value of the type of grapes involved in the transaction on or about December 10, 1944, was \$4.00 per lug. The grapes sold to the purchasers were sold at a specified amount of \$2.50 f.o.b. plus \$50.00 buying service, plus our brokerage of 3c per lug.

In any claim for damages our brokerage of 3c per lug or \$33.15 per car should be included, as due to failure to ship we were obliged to lose this sum, as naturally the buyers would not pay us brokerage when the cars were not received.

Yours very truly,

**SOUTHWEST BROKERAGE
COMPANY,**

/s/ **JAY MARGULES.**

Plaintiffs' Exhibit No. 5—(Continued)

Exhibit No. 4

Western Union Telegraph Co.

(Copy)

TTLA05D.WA46 Collect IL-WUX Washington,
D. C., 940A

Southwest Brokerage Co.—Fruit and Vegetable
Divn, 2103½ Cadiz St., Dal.

Retel Based on Facts Presented Would Ap-
pear California Shipper Obligated Deliver Ten Em-
perors 2.50 FOB. Don't See Where Lifting OPA
Ceiling Has Any Effect on Contract This Kind. If
Can Assist Further Advise.

T. C. CURRY,

War Food Admin.

R TLA05 SK.

Exhibit No. 7

Western Union Telegraph Co.

(Copy)

TTLA77D. SB41 22 Ser-Wux Los Angeles, Calif.,
3 1016A

Southwest Brokerage Co., Dal.

Did You Sell Entire Ten Cars Emperors? Corey
Others waiting. Do Aflep Tomatoes 30906? First

Plaintiffs' Exhibit No. 5—(Continued)

Car Arrived Kaysee Today Reported Beautiful Quality.

ASSOCIATED FRUIT DIS-
TRIBUTORS OF CALIF.

Aflep 30906. (23).

.....
Western Union Telegraph Co.

(Copy)

SK 4 Ser 10/3/44 Associated Fruit Dist.
Los Angeles, Calif.

What Are U Talking About? We Ordered and
U Already Confirmed by Wire 10 Cars Emperors
Advise. Unarrived Toms 30906 Sell Elsewhere if
U Desire.

SOUTH WEST BRKG. CO.
Frt. & Veg. Divn.

Exhibit No. 9

Western Union

(Copy of Teletype Message)

Rdy With LA Announce Pls Assoc Fruit Distrs LA
GA SW at Dallas.

Refg That 6 Emps FTW and 4 Dallas Deal OK
2.50 Net 50.00 for U if Legal. Presume Its Legal
of U Wouldn't Offer It. Advise GA Havnt Bn
Able Contact the Shpr Yet but Sure Its Okay. Wl
Wire U Def One Way or Other Soons Get Him.
Yes It Is Legal Naturally a Receiver Can Pay His

Plaintiffs' Exhibit No. 5—(Continued)

Whole Markup for Buying Brokg if He Wants to
Wl Wire U Soons Rec Def Conf. Undstnd Its Basis
1000.00 Dep Against Each US One Inspn as They
R Loaded. What Else New GA.

Fars I kno That Covers It. Try Wire Nite Sure
Thx End. OK End.

Exhibit No. 10

Western Union Telegraph Co.

(Copy)

DH140 NL PD-WUX Los Angeles, Calif., Oct. 12.
Southwest Brok. Co., Dal.

As Fnal Gesture and Endeavoring to Amicably
Settle Grape Contract Red Lion Packing Company
Willing Sell Basis 3.00 Net FOB Quantities Spec-
ified on Contract Buyer to Pay Us .10 Pkge Pro-
curement Quality Is Nice Uninspected Field Run
but Red Lion States in All Probability Fruit Easily
Grade US One Arrival but Not Willing Make This
Guarantee Our Inspector Has Seen Fruit Says
Really Beautiful If Buyers Wish We Will Ar-
range to Put Cars Storage Which We Have Al-
ready Under Contract Otherwise Red Lion Takes
Attitude That After All He Had Nothing to Do
With Ceiling Feels He Relieved All Moral Respon-
sibility by Making This Offer Claims Turning Down
Offers His Entire Outfit Today Basis 3.40 Cash
FOB.

ASSOCIATED FRUIT DIS-
TRIBUTORS OF CALIF.

Plaintiffs' Exhibit No. 5—(Continued)

Exhibit No. 11

Western Union Telegraph Co.

(Copy)

SK 11 NL 10/13/44 John Kanzajian, Red Lyon
Pkg. Co.

Exeter, Calif.

Re Ten Cars Emperors Confirmed by You Thru
Associated for West Texas Produce and Central
Fruit, We Wiring Associated Tonite Offer of 3.00
FOB Plus 10c Procurement Charge Unacceptable
and Buyers Want Contract Fulfilled as Confirmed.
If Not Going Thru on This Basis Please So Advise
Immediately by Wire as Buyers Desire Take Action
Protect Their Interests. Personally Dont See How
Lifting Ceiling Has Anything to Do With Con-
tract Which Was Made at Definite Price and Wash-
ington Has Wired Us to This Effect Also. Advise
Promptly Direct or Thru Associated Thanks.

SOUTHWEST BROKERAGE
CO.,
Frt. & Veg. Divn.

Plaintiffs' Exhibit No. 5—(Continued)

Exhibit No. 12

Western Union Telegraph Co.

(Copy)

GDH125 13 SER-WUX Los Angeles, Calif., 11
501P

Southwest Brokerage Co., Dal.

Please Call Us Collect 10 AM Our Time Tomorrow
Tucker 3839 Regarding Emperor Deal.

ASSOCIATED FRUIT DIS-
TRIBUTORS OF CALIF.

3839

Exhibit No. 13

Western Union Telegraph Co.

SK 2 NL 10/12/44 Associated Fruit Dist., Los Angeles,
Calif.

Re Phone West Texas and Central Do Not Admit
Lifting Ceiling Voids Contract and Curry Has Con-
curred in This as Price Was Definite Per Wires.
Therefore Buyers Intend Hold Urselves and Red
Lyon for Failure to Deliver if Grapes Not Shipped
Per Contract and We of Course Have to Go Against
Somebody for Our Brokerage. Personally Dont
See How They Can Get Out of This Deal and
Think Advisable They Ship as Contracted or Offer
Some Reasonable Adjustment for Buyers Approval.

SOUTHWEST BROKERAGE
CO.,

Frt. & Veg. Divn.

Plaintiffs' Exhibit No. 5—(Continued)

Exhibit No. 14

Western Union Telegraph Co.

(Copy)

SK 10 NL 10/13/44 Associated Fruit Distributors,
Los Angeles, Calif.

Tomatoes Really Shot 1.25 to 2.00 Delivered Un-
arrived Fars I know 18378 but Really Believe U
Do Better Elsewhere. Will AFLEP if Any Re-
ceived 18378. Regarding 10 Car Emperor Deal
West Texas and Central Say Offer Per Ur Wire
Unacceptable Want Definite Yes or No by Tomor-
row if Contract Not Going to Be Filled by Re-
sponsible Party so Can Take Whatever Action
They Deem Proper.

SOUTHWEST BRKG. CO.,

Frt. & Veg. Divn.

Exhibit No. 15

Western Union Telegraph Co.

(Copy)

TTLA05D. WA46 Collect DL-WUX Washington,
D. C. 11 940A.

Southwest Brokerage Co., Fruit and Vegetable
Divn. 2103 1/2 Cadiz St., Dal.

Retel Based on Facts Presented Would Appear
California Shipper Obligated Deliver Ten Em-
perors 2.50 FOB Dont See Where Lifting OPA

Plaintiffs' Exhibit No. 5—(Continued)

Ceiling Has Any Effect on Contract This Kind. If
Can Assist Further Advise.

T. C. CURRY,

War Food Admin.

R TLA05 SK.

Exhibit No. 16

Western Union Telegraph Co.

(Copy)

71 OCTVWRTP Southwest Brokerage Co.

Contacting Grower Toht DV Stand CCRIH Em-
perors.

ASSOCIATED FRUIT DIS-
TRIBUTORS OF CALIF.

326P

.....

Western Union Telegraph Co.

(Copy)

SK 1 DL 10/11/44 Associated Fruit Dist of Calif.

Los Angeles, Calif.

Answering Curry, War Food Administration,
Says Lifting OPA Ceiling Has Not Effect on This
Contract. Better Advise Red Lion Accordingly
Today Get Definite Answer Yes or No Whether
Going Ship Per Contract Now or Later So Buyer
Also Ourselves Know How to Handle Advise.

SOUTHWEST BRKG. CO.,
Frt. & Veg. Divn.

RIDN 940A.

Plaintiffs' Exhibit No. 5—(Continued)

Exhibit No. 17

Western Union Telegraph Co.

(Copy)

DG131 LG SER PD WUX Los Angeles, Calif. 10
354P

Southwest Brokerage Co.

Shipper Redlion Takes View Account Ceiling
Lifted Any Contracts Emperors Voided Willing Go
Along Give Your Trade Preference Shipping as
Packed at Market Price Which Today 3.25 AFOHD
Advise.

ASSOCIATED FRUIT DIS-
TRIBUTORS OF CALIF.

.....

Western Union Telegraph Co.

(Copy)

SK 1 DL 10/10/44 Associated Fruit Dist of Calif.
Los Angeles, Calif.

Understand Ceiling Lifted Table Grapes, Whats
to Prevent Shipping Some These Ten Cars In-
stead Putting All in Storage Advise. Re Toma-
toes Twos Aceankist Biltmore Sold Track 2.00 De-
livered Various Shippers Rolling Sale Arrival. Will
AFLEP Anything Which Arrives Here.

SOUTHWEST BRKG. CO.,
Frt. & Veg. Divn.

Plaintiffs' Exhibit No. 5—(Continued)

Exhibit No. 18

Western Union Telegraph Co.

(Copy)

DS 62 NL PD Oct 10 710P

J. W. Curry, War Food Administration Regulatory
Divn, Wash., D. C.

Contract Made Ten Days Ago With California
Shipper as Agent for Another Party for Ten Cars
Emperor Grapes at 2.50 FOB Packing Starting
October 10th Shipment From Storage California
Starting December 9th Table Grape Regulation
Lifted Today Shipper States Other Party Consid-
ers Contract Void Willing to Ship Basis Now 3.25
FOB Appreciate Advise Your Ideas Morning as to
Status of Contract.

SOUTHWEST BROKERAGE
CO.,

Fruit & Vegetable Divn.

Chg Acct SG 202 Produce Exchange Bldg.

Exhibit No. 19

Western Union Telegraph Co.

(Copy)

TLA24D. SB113 LG PD SER-WUX Los An-
geles, Calif. 16 1147A

Southwest Brok. Co., Dal.

Again Talked Redlion They State Definitely Un-
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Plaintiffs' Exhibit No. 5—(Continued)

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Certificate

I, L. W. McCreight, appointed to take the testi-
mony of Jay Margules, whose name is subscribed
to the attached deposition, hereby certify that on
the 21st day of August, 1946, at the place and date
specified in said order the said Jay Margules was
first sworn by me to testify to the truth in relation
to the matters in controversy between the said Cen-
tral Fruit & Vegetable Company, and West Texas
Produce Company, Complainers, and the said As-
sociated Fruit Distributors of California, and Red
Lion Packing Company, Respondents; that the testi-
mony of said witness was reduced to writing and
was thereafter subscribed by the said Jay Mar-
gules in my presence.

In testimony whereof I have hereunto set my
hand and seal this 8th day of Oct., 1946.

[Seal] /s/ L. W. McCREIGHT,
Notary Public in and for
Dallas County, Texas.

Received in evidence July 11, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 237, inclusive, contain the original Notice of Appeal from Reparation Order of Secretary of Agriculture; Petition Setting Forth Proceedings Before the Secretary of Agriculture, etc.; Certified Record from the Secretary of Agriculture; Amended Answer of Respondent and Appellee Raymond M. Crane, etc.; Trial Brief Presented on Behalf of Raymond M. Crane, etc.; Complainants' Pretrial Memorandum Under Rule 12; Trial Brief of John Kazanjian, etc.; Objections of Complainants to Proposed Findings of Fact and Conclusions of Law, etc.; Findings of Fact and Conclusions of Law; Judgment; Motion for New Trial with Supporting Affidavits; Notice of Motion to Set Motion for New Trial and to Grant Oral Arguments Thereon; Notice of Appeal; Undertaking for Costs on Appeal; Statement of Points Intended to Be Relied Upon on Appeal and Designation of Record on Appeal and a full, true and correct copy of Minute Orders Entered November 6, 1950, and January 16, 1951, which, together with original plaintiffs' exhibits 1 to 6, inclusive, original defendants' exhibits A to M, inclusive, and copy of Reporter's Transcript of Proceedings on July 11, 12, and 13, 1950, and November 6, 1950, transmitted herewith, constitute the record on appeal to the

United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$3.20 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 21st day of March, A.D. 1951.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12884. United States Court of Appeals for the Ninth Circuit. Central Fruit & Vegetable Co., and West Texas Produce Company, Appellants, vs. Associated Fruit Distributors of California, Raymond M. Crane, Red Lion Packing Company and John C. Kazanjian, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed March 26, 1951.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

CENTRAL FRUIT AND VEGETABLE CO.
and WEST TEXAS PRODUCE COMPANY,
Appellants,

vs.

ASSOCIATED FRUIT DISTRIBUTORS OF
CALIFORNIA and RED LION PACKING
COMPANY,

Appellees.

STATEMENT OF POINTS ON WHICH
APPELLANTS INTEND TO RELY

Appellants adopt as their statement of points on which they intend to rely under Rule 19 (6) the statement of points filed in the District Court on February 27, 1951.

J. MANUEL HOPPENSTEIN,
and

HARRY A. PINES,

By /s/ HARRY A. PINES,
Attorneys for Central Fruit and Vegetable Co. and
West Texas Produce Company, Appellants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 27, 1951.

12884
No. 12,892—

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SIGNAL MANUFACTURING COMPANY, a corporation and
CHARLES SCHNEIDER, d. b. a. SIGNAL MANUFACTURING
COMPANY,

Appellants,

vs.

THE KILGORE MANUFACTURING COMPANY, a corporation,

Appellee.

BRIEF FOR APPELLANTS.

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No. 12,892
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

SIGNAL MANUFACTURING COMPANY, a corporation and
CHARLES SCHNEIDER, d. b. a. SIGNAL MANUFACTURING
COMPANY,

Appellants,

vs.

THE KILGORE MANUFACTURING COMPANY, a corporation,
Appellee.

BRIEF FOR APPELLANTS.

INTRODUCTION.

This is an appeal by defendant-appellant (hereinafter referred to as defendant) Charles Schneider, doing business as Signal Manufacturing Company, and his predecessor corporation, from a final judgment entered by the District Court of the United States for the Southern District of California, Central Division, holding valid and infringed claims 10 and 11 of patent No. 1,947,834 to Driggs and

*The parties shall be referred to as plaintiff and defendant. The references to the printed record, including Volume II of Exhibits, shall be by R. followed by page number. Emphasized matter in decisions is by defendant.

Faber. All other claims (claims 1-9 and 12-23) have been held invalid.

The Court found that defendant-appellant had not been guilty of acts of unfair competition and the second count of the complaint stands dismissed. The Court ordered an injunction and an accounting that plaintiff recover costs from the defendant and reserved decision on plaintiff's prayer for increased damages and attorneys' fees until after determination as to plaintiff's damages before a Special Master.

This appeal is taken because the evidence and the law do not support the findings. It is urged that claims 10 and 11 are invalid and not infringed and that the Court erred in failing to award attorneys' fees to defendant.

STATEMENT OF JURISDICTION.

The Trial Court had jurisdiction of the original complaint and answer as well as the second amended answer and counterclaim and of the parties under the patent laws of the United States and diversity of citizenship, jurisdiction being admitted by defendant [paragraph III of answer to first complaint and paragraph III of second amended answer, R. 10 and 19]. Defendant, in its second answer, included a counterclaim for declaratory judgment as to invalidity of all claims not originally in issue [R. 27].

Defendant filed a timely notice of appeal [R. 77], a concise statement of points on appeal [R. 78] and adopted such statement of points [R. 190].

BRIEF STATEMENT OF THE CASE.

The Kilgore Manufacturing Company is an Ohio corporation engaged in the manufacture of various types of smoke bombs, signal flares, etc. For many years it operated under a license granted it by the patentees of the patent in suit and since about July, 1947, has had title to the patent in suit. The patent relates to a signal shell, to be fired from a hand gun, the shell being shot into the air to there explode and discharge a parachute carrying a lighted signal flare.

Appellant (defendant below) was part owner of its predecessor corporation, Signal Manufacturing Company, a California corporation, and since about November, 1947, appellant Charles Schneider acquired the said corporation and has been doing business as Signal Manufacturing Company. Defendant's principal place of business is at Los Angeles, California; defendant manufactures parachute signal flares at a plant near Saugus, California.

Defendant was originally charged with infringement of all of the claims of the patent in suit and plaintiff's Exhibit 2, attached to the complaint, was an exemplar of defendant's signal flare which was charged to infringe. Plaintiff then limited the charge of infringement to the construction shown in claims 1-11 and 15 and 16; subsequently, in view of interrogatories filed by defendant, plaintiff withdrew claims 6, 15 and 16. Inasmuch as defendant had been caused to prepare on all of the claims (as originally charged), defendant filed a counterclaim for declaratory judgment, holding all of the claims invalid and not infringed.

Both of the inventors of the patent in suit No. 1,947,834 are dead, but the patent in suit was involved in litigation, together with other patents, in the case of *The Kilgore Manufacturing Company, et al. v. Triumph Explosives, Inc., et al.*, 37 Fed. Supp. 766. In that case the patent in suit was held not infringed and some doubt was expressed as to its validity, the Court stating:

“It is in no sense a pioneer patent, but if valid, is limited (in combination with other elements specified in the claims) to the particular form of construction described, that is, a one-piece aluminum cylinder of extruded metal with a relatively heavy base and thin side walls.”

In referring to the extruded metal construction, the Court, in the *Triumph* case, also stated:

“As appears from the file wrapper of the patent, there is nothing novel in this of itself.”

During pretrial, plaintiff admitted that if there was any invention in the patent in suit, it lay in making the bottom of the case or shell integral with the side wall, out of one piece of metal.

“I said the new element was a one-piece projectile shell including relatively thin side walls and a heavy base.” [R. 86.]

During trial, plaintiff’s counsel admitted that the combination of elements was not new:

“The Court: So everything that is described in the patent in suit in combination has been previously claimed in combination, has it not, by these same inventors—

Mr. Schmieding: Except the one-piece shell.

The Court: —in prior art, except that now they say we combine all these things with a one-piece shell?

Mr. Schmieding: That's right, your Honor.

* * * * *

The Court: The combination has been the same, except that the shell has been in more than one piece?

Mr. Schmieding: That's right." [R. 145.]

The issue is very simple and can be stated in few words: **Is it invention to substitute a one-piece container for a two-piece container in an old combination?**

By dilatory tactics, by needless and baseless argument and by repudiation of its own admissions, plaintiff prolonged the trial unnecessarily and confused the Trial Court. Such a simple issue should not require a four-day trial and a rehearing and additional arguments.

The Trial Court in the instant case appeared to be confused at the conclusion of the case. The Court first held claims 1-5 invalid for lack of invention and claims 7-11 valid and infringed [R. 149]. Within a few minutes, the Court held claim 9 invalid [R. 151] and a few minutes later held claims 7 and 8 valid but not infringed [R. 153]. Plaintiff thought claims 7 and 8 should be held invalid and the Court then so held [R. 154]. A few minutes later plaintiff admitted that claims 6 and 12 were invalid and the Court so held [R. 154-155]. Plaintiff then admitted that claims 12-23 were invalid and the Court so held [R. 155].

It is evident that plaintiff's charge of infringement was not made in good faith because of the ready manner in which most of the claims were admitted invalid when the Trial Court was attempting to reach a decision. Actually, claims 10 and 11 are invalid and could not possibly be infringed because of limitations in such claims and upon plaintiff's own admissions.

BRIEF SUMMARY OF DEFENDANT'S ARGUMENT.

The concise statement of defendant's points on appeal appears in the record, pages 78 and 79. The argument can be divided into three sections relating to the issues of invalidity, lack of infringement and on the issue of costs.

I. Defendant urges that the decision of the Trial Court must be reversed and claims 10 and 11 be held invalid because:

(a) Claims 10 and 11 are invalid because they do not define an invention. There is no invention in making an article such as a shell out of one piece of metal so that the walls and bottom are integral.

(b) Claims 10 and 11 are invalid because they are for an **aggregation of admittedly old elements**, which act in the **same way** and for the **same purpose** and are in the **same relationship** as that shown in prior expired patents.

(c) The Trial Court misapplied and made an error of law in holding claims 10 and 11 valid. Findings 9 and 13 [R. 67-68] are contrary to the record in this case.

II. Defendant does not and cannot infringe because:

(a) Claims 10 and 11 are specifically limited to a form of shell not used by defendant.

(b) Uncontradicted evidence showed that defendant never manufactured the article defined in claims 10 and 11.

(c) Not a shred of evidence exists in support of finding 15 [R. 68].

III. The judgment is in error in assessing costs against the defendant and actually costs and attorneys' fees should be assessed against the plaintiff because:

(a) The record is replete with evidence that plaintiff did not present the action in good faith.

(b) Plaintiff admitted that there was no invention involved two years before the trial, but persisted in repudiating its admissions and unnecessarily prolonging the trial in the hope of driving defendant to bankruptcy.

(c) Plaintiff has attempted to becloud the issue and has advanced baseless arguments.

(d) The Court erred in finding "conscious, deliberate and wilful infringement" since this finding has no basis in the evidence. Costs and expenses should be awarded to defendant and against the plaintiff.

Throughout this brief specific reference will be made to the record to clearly show the merit of defendant's contentions. It is expected that plaintiff will again attempt to becloud the issue by generalities having no basis in fact.

THE PATENT IN SUIT.

Patent No. 1,947,834 in suit is entitled "Flare Signal" and was issued in February, 1934, to Driggs and Faber. This patent (expired February, 1951) is Exhibit 1 in Volume II of the record in this case. The file history of the patent is defendant's Exhibit A, a physical exhibit.

The device of the patent is simple, but no single drawing shows what defendant makes. Fig. 2 shows the general assembly with a base cartridge 27 (at right end) provided with a central percussion cap 36. Fitted into the cartridge is the cylindrical container 2 having a bottom 1

in which there is positioned a delay fuse in the form of an eyelet 4 with fuse composition 5. Black powder 35 is between the bottom of the container 2 and the cartridge.

When the flare is shot from a breech loading gun, the black powder shoots the container 2 into the air; a few seconds later the delay fuse ignites the ejection charge 6 and blows the contents out of the container.

The container carried a flare candle 10 which is connected to a parachute 20 by lines. In order to prevent the parachute from being wadded up during ejection, it is wrapped around a thrust stick 21.

The final combination is therefore the cartridge of Fig. 2 with the container of Fig. 1.

It is to be noted that the container need not be made of one piece of metal. Fig. 3 shows a container, with the same contents as Fig. 1, but with a separate, screwed-on bottom. Thus the patentees show that a two-piece container is just an alternative for a one-piece container.

The Trial Court held claims 1-9 and 12-23 invalid and actually plaintiff admitted that these claims were invalid.

It is to be noted that the cartridge of Fig. 2 is provided with an outwardly extending shoulder 27a at its base. This permits the shell to be used in breech-loading guns, as any shot gun shell. Fig. 4, however, shows a long cartridge with an annular groove near the bottom; this shell cannot be used in breech-loading guns.

“Q. And therefore, Figure 4 really relates to a muzzle loading shell which is of the type which you say was used from aircraft? A. Yes, sir, that’s definitely an aerial shell.” [R. 143.]

The Patent Office rejected many claims for lack of invention and some of these claims are reproduced on pages 178-180 of the record. Plaintiff admitted that the following claim was rejected for lack of invention and cancelled by plaintiff:

“38. In combination, a one-piece drawn shell case having an expelling charge and delay fuse in the base thereof, a gas-producing member attached to a parachute contained therein and ejectable therefrom by said expelling means, and a detachable cartridge case mounted on one end of the shell case having a propelling charge and primer therefor mounted therein.”
[R. 180.]

Claims 10 and 11 cannot cover what is in this cancelled claim and must show invention elsewhere. This is particularly true since

“The Court: If there is any invention here at all, it seems to me, in view of the prior art, it has to be a very narrow combination, very narrow in scope.
* * *

Mr. Schmieding: It is in a crowded art.” [R. 146-147.]

“* * * and it is well settled that in a crowded art and in a combination patent, the claims are to be limited to the specific language used in the claim. *Keystone Driller Co. v. Northwest Engineering Corp.*, 294 U. S. 42; *Shakespeare Co. v. Perrine Mfg. Co.*, *et al.*, 8 Cir. 91 F. (2d) 199.”

General Bronze Corp. v. Cupples Products Corp.
(C. A. 8), F. 2d, 89 P. Q. 355.

Claim 11, which is the most complete claim, reads as follows:

“11. In combination,
a cartridge case having a base with an annular groove,
a propelling charge chamber and a fuse mounted therein, said base carrying side walls,
a telescopically-arranged shell mounted therein having a relatively heavy integral base and thin side walls,
a fuse in the base of said shell communicating with the propelling charge of the cartridge case on one side and with an expelling charge in the shell on the other side,
a flare and a parachute in said shell,
and means to prevent the collapse of said parachute,
and detachable closure means for said shell engaging said means for preventing the collapse of the parachute.”

Attention is called to the fact that the claim specifically requires a case **“having a base with an annular groove.”** Those words call for a device like Fig. 4, which is a muzzle loader, as admitted by plaintiff [R. 143]. **Defendant has never made a muzzle loading device; there is no infringement;** there is no foundation for the Trial Court’s gratuitous finding of “wilful” infringement [Finding 15, R. 68].

Lack of invention will become apparent in subsequent comparison of this claim with (1) plaintiff’s own admissions, and (2) the prior art which was not referred to by the Patent Office in allowing the claims.

NO PRESUMPTION OF VALIDITY ATTACHES TO THE PATENT IN SUIT.

In prior litigation the District Court of Maryland stated, with respect to the Driggs and Faber patent in suit:

“It is in no sense a pioneer patent”

and the 4th Circuit stated:

“The validity of the patent is not free from doubt, but the question need not be decided here; * * *”

Kilgore Mfg. Co. v. Triumph Explosives, Inc., 128 F. 2d 444.

It is to be noted that the patent here in suit was allowed by the Patent Office through inadvertence, and that the Patent Office **did not cite** the following important prior patents and publications which are here before the Court:

Exhibit F-3	Patent No. 116,094	[R. 195]
Exhibit F-8	Patent No. 1,114,228	[R. 200]
Exhibit F-12	Patent No. 1,481,662	[R. 204]
Exhibit F-13	Patent No. 1,602,601	[R. 205]
Exhibit F-16	Patent No. 1,712,383	[R. 208]
Exhibit F-17	Patent No. 1,754,986	[R. 209]
Exhibit F-18	Patent No. 1,776,755	[R. 210]
Exhibit F-19	Patent No. 1,785,770	[R. 211]
Exhibit F-21	British patent No. 2,257	[R. 213]
Exhibit F-27	“History of Military Pyrotechnics”	[R. 217]

This Court has repeatedly held that the presumption is overcome under such circumstances:

“The presumption of validity which attends the issuance of Letters Patent by the Patent Office is overcome in this case by the clear evidence of anticipation in the prior art which was not cited or considered by the Patent Office when the application for appellant’s

patent was passed on. See *Elliott & Co. v. Youngstown Car Mfg. Co.*, 181 Fed. 345 (C. C. A. 3); *American Soda Fountain Co. et al. v. Sample*, 130 Fed. 145 (C. C. A. 3)."

Mettler v. Peabody Engineering Corporation, et al., 77 F. 2d 56 (C. A. 9).

See also:

McClintock v. Gleason et al., 94 F. 2d 115 (C. A. 9);

Stoody Co. v. Mills Alloys Inc., 67 F. 2d 807 (C. A. 9);

Market Soda Fountain Co. v. Sample, 130 Fed. 145 (C. A. 9).

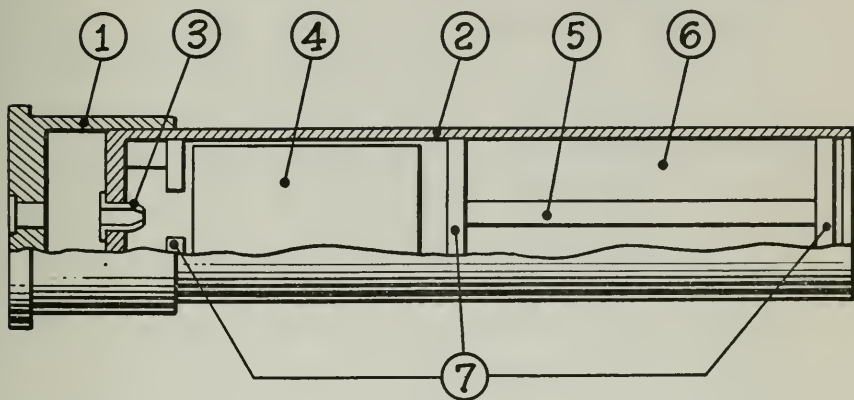
The analysis of the prior art, not cited by the Patent Office, conclusively shows that the patent in suit **lacks invention**. Findings and conclusions which are contrary to the facts and established rules of law cannot be permitted to stand.

THE EVIDENCE IN THIS CASE COMPELS JUDGMENT OF INVALIDITY.

Shells or ammunition capable of being fired to a height, to there eject a flare suspended from a parachute, have been known since 1864 [see Deft. Ex. F-1, R. 193, patent No. 41,173]. There is no patentable novelty in this general combination of elements.

Plate I attached hereto shows the construction of a parachute flare of the type charged to infringe and identifies the prior expired patents which show the elements. Although a number of prior patents are referred to, an examination of only two or three will convincingly show that the patent in suit lacks invention.

ALL PARTS, IN SAME RELATION, FOR SAME PURPOSE, ARE SHOWN IN PRIOR PATENTS.



(1) Cartridge with percussion cap, shown in Exhibits F-6, F-14, F-15, F-16, F-17, F-18, F-22 [R. 198, 206, 207, 208, 209, 210 and 214].

(2) Tubular shell or case with delay fuse in bottom, shown in Exhibits F-15, F-16, F-17, F-18 [R. 207, 208, 209, 210].

Tubular shell made of one piece of metal, shown in Exhibits F-3, F-4, F-14, F-21 [R. 195, 196, 206, 213].

(3) Eyelet with flange on bottom of shell, shown in Exhibits F-3, F-18, F-19 [R. 195, 210, 211].

(4) and (6) Flare and parachute in a projectile shell, shown in Exhibits F-1, F-2, F-9, F-13, F-16, F-17, F-18, F-19 [R. 193, 194, 201, 205, 208, 209, 210, 211].

(5) Thrust stick in parachute, shown in Exhibit F-18 [R. 210].

(4) (5) (6) and (7) in combination within shell (2), shown in Exhibits F-13, F-16, F-17, F-18, F-19, F-22 [R. 205, 208, 209, 210, 211, 214].

Driggs and Faber, the patentees of the patent in suit, had a number of similar patents (all expired) which were **not cited** by the Patent Office in allowing the patent in suit. These are all part of Defendant's Exhibit F [Vol. II of Record]:

Exhibit F-15	No. 1,712,382	[R. 207]
Exhibit F-16	No. 1,712,383	[R. 208]
Exhibit F-17	No. 1,754,986	[R. 209]
Exhibit F-18	No. 1,776,755	[R. 210]
Exhibit F-19	No. 1,785,770	[R. 211]

(1) Cartridges, made of a single piece of metal, with an integral bottom, such bottom having a hole in which the percussion cap is mounted, are shown in all of these patents. In Exhibit F-15 for example, see Figs. 3 and 5, which show a one-piece case with an annular groove i', which permits the shell to be used in the muzzle loading gun. The patent states "The cartridge case may be cylindrical throughout * * *" instead of being provided with the enlarged forward portion [p. 1, column 2, lines 108 ff]. Substantially the same construction is shown in Fig. 1 of Exhibit F-16, Fig. 5 of Exhibit F-17, and Fig. 1 of Exhibit F-18.

(2) A shell or case with a delay fuse (3) in the bottom of the case is shown in these patents. In each instance the shell or case is held in the cartridge.

In patent No. 1,712,383 [Exhibit F-16] it is stated that the shell or container (in which the parachute and flare are carried) may be made of aluminum.

"This cylinder D may be made of aluminum, bakelite, cardboard or other suitable material." [P. 2, lines 30-32.]

In patent No. 1,754,986 [Exhibit F-17] the shell is identified as “* * * the cylindrical container C which is preferably made of aluminum * * *” [p. 2, lines 15-17].

The delay fuse is indicated at N in Exhibit F-17 and as an eyelet E' in Exhibit F-18. In Exhibit F-19 it is in the form of a flanged eyelet 10, identical in shape to that used in the patent in suit. In each instance, the delay fuse is in the bottom of the shell, and **performs the same function in the same position between the same parts** as in the patent in suit.

- (5) The use of shims or sticks in the parachute compartment of the container or shell (2) in order to prevent the parachute from being compressed or wadded when it is being ejected from the container is shown in Exhibit F-16 [see shims N, described on p. 2, lines 77-81 and 111-120]. In Exhibit F-18, the stick or rod M is clearly shown in Fig. 1.

The **entire contents** of the container, including flare candle (4), stick (5), parachute (6) and suitable pieces of felt wadding (7), as well as the cable connecting the parachute and flare candle, end closure and charge of powder for ejection of the contents, are shown in these prior patents in the same relationship, and for the same purposes as in the patent in suit. **There is no invention in these contents, according to the testimony of Driggs, as admitted by plaintiff.**

“A. ‘1. That Louis L. Driggs, Jr., one of the alleged inventors of patent No. 1,947,834 in suit herein, testified under oath in the case of The Kil-

gore Mfg. Co. *et al.* v. Triumph Explosives, Inc., *et al.*, in which case patent No. 1,947,834 was in issue, as follows:

“The Court: There is nothing new, is there, in the arrangement of the contents of the projectile? That is to say, this method of arranging the powder and connecting fuses and protecting certain parts by the felt washer and including a parachute and all that, is there anything new in that?

The Witness: Not in the projectile itself, no, basically.”

* * * * *

“Q. Is it your contention that there is anything new in the arrangement or in the combination of a projectile containing those particular contents, with a cartridge case containing a propelling charge for such a projectile, being adapted to be projected from the cartridge case when the propelling charge is exploded? A. No.”

* * * * *

(Answer) “Plaintiff admits that Louis L. Driggs, Jr., testified as quoted in paragraph 1 of defendant’s Requests for Admissions * * *.”” [Deft. Ex. G, R. 161 and 162.]

The uncontrovertible evidence of these prior publications shows that every element has been used in **same combination for the same purpose**. The patent in suit must be invalid.

The record conclusively proves that each of the elements is old and the entire combination is old. In view of the showings of the prior patents and plaintiff’s admissions, it

is inconceivable how the Trial Court could state that the patentees of the patent in suit

“* * * produced a new combination * * *
[Finding 9, R. 67] or that the claims are directed
“* * * to a combination that is not only new
and useful, but embodies invention and constitutes
patentable subject matter.” [Finding 13, R. 68.]

The above findings as to a “new” combination are directly contrary to plaintiff’s own admissions:

“The Court: So everything that is described in the patent in suit in combination has been previously claimed in combination, has it not, by these same inventors—

Mr. Schmieding: That’s right, your Honor.

* * * * *

The Court: The combination has been the same, except that the shell has been in more than one piece?

Mr. Schmieding: That’s right.” [R. 145.]

PLAINTIFF IS CHALLENGED TO POINT TO A SINGLE NEW ELEMENT IN THIS COMBINATION; PLAINTIFF IS CHALLENGED TO POINT TO A SINGLE INSTANCE OF INVENTION.

Plaintiff cannot argue that there is invention in making the container or shell 2 out of one piece of metal, because this shell (2) with its delay fuse (3) was described in claims 1, 2 and 3 of the patent in suit and these claims were properly held invalid by the Trial Court.

Claim 1, held invalid, reads as follows:

“In combination, a shell comprising a base and side wall of one piece of drawn metal, said base having an aperture, and a tubular eyelet having a shoulder

inserted in said aperture, the shoulder thereon resting on the outside of the base of the shell.”

Plaintiff did not appeal from this holding and has constructively disclaimed a one-piece shell. Two years before the trial of this case plaintiff admitted that there was no invention by stating:

“Plaintiff admits that prior to the earliest date of invention by Driggs and Faber, that there was described in printed publications and known to others in the United States—

(d)—a projectile case having a base and substantially cylindrical side walls, of one piece of metal, the base being provided with an aperture.”
[Exhibit G, B5(d), R. 172.]

The entire patent is invalid and void for lack of invention.

PLAINTIFF'S ADMISSIONS COMPEL HOLDING CLAIMS 10 AND 11 INVALID.

Two years before the trial of this case, plaintiff made admissions, in answer to defendant's requests for admissions and interrogatories, which admissions conclusively show that all of the claims of the patent in suit were invalid for lack of invention. These admissions made by plaintiff under oath and obtained under Rule 36 F. R. C. P., were admitted in evidence [R. 90] in the course of judicial proceedings.

“Facts judicially admitted are facts established not only beyond the need of evidence to prove them, but beyond the power of evidence to controvert them.”

Hill v. Federal Trade Commission, 124 F. 2d 104,
106 (C. A. 5);

Oscanyan v. Arms Co., 103 U. S. 261, 263.

This Court is respectfully urged to read the admissions, since the entire case can be determined on this evidence alone.

The effect of the admissions made by plaintiff upon the flare allegedly covered by claim 11 is graphically illustrated on the appended plate, wherein II illustrates the flare of claim 11. Claim 11 is applied directly, reading upwardly from the bottom.

Driggs, one of the inventors, **admitted** that there was **no invention** in the contents or arrangement of the contents or arrangement of the contents of the shell [Exhibit G, Admission A-1; R. 161, 162].

Since there is no invention in the contents, let us eliminate the contents and go to plate III where the contents have been left out.

Plaintiff has **admitted** that there is **no invention** in the combination of a long projectile and a short cartridge [Exhibit G; see A.8(c); R. 168] [shown in many prior patents and publications; see for example Exhibits F-6 R. 198; F-13, R. 205; K-1].

Since there is no invention in this combination, let us eliminate the cartridge [which is also old as shown by many prior patents, Exhibits F-6, R. 198; F-13, R. 205; F-14, R. 206; F-17, R. 209; F-18, R. 210; F-27, Plate 4a, R. 217] and go to plate IV which is now just an empty container.

Plaintiff admitted that there is **no invention** in making this out of aluminum [Exhibit G, A-5, R. 172, and B-10, R. 173].

Plaintiff had to make this admission because prior expired patents [Exhibits F-16 and F-17] stated that the

PLAINTIFF'S ADMISSIONS [EXHIBIT G] DEMONSTRATE LACK OF INVENTION AND PROVE INVALIDITY

CLAIM 11

and detachable closure means for said shell engaging said means for preventing the collapse of the parachute.

and means to prevent the collapse of said parachute

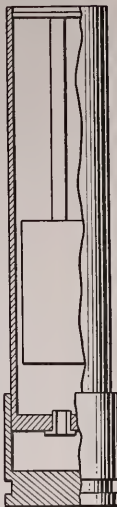
a flare and a parachute in said shell,

a telescopically-arranged shell mounted therein having a relatively heavy integral base and thin side walls,

a fuse in the base of said shell communicating with the propelling charge of the cartridge case on one side and with an expelling charge in the shell on the other side,

11. In combination, a cartridge case having a base with an annular groove, a propelling charge chamber and a fuse mounted therein, said base carrying side walls,

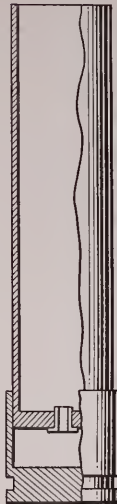
II



No invention in contents or arrangement of contents [Exhibit G, R. 161-162]

No invention in combination of short cartridge and long projectile [Exhibit G, A8c, R. 168; also B8, R. 175]

III



No invention in one-piece projectile [Exhibit G, B5d, R. 172]

Nor in projectile with eyelet [Exhibit G, A6, R. 169]

Nor in drawing from metal [Exhibit G, B10, R. 173]

Nor in making from aluminum [Exhibit G, A5 and C7, R. 172-173]

IV



(This shell is defined in claims 1-3, which have been held invalid)

SINCE THERE IS LACK OF INVENTION, CLAIMS 10 AND 11 ARE INVALID

projectile or cylindrical container is “preferably made of aluminum.” [P. 2, line 16, R. 209.]

Plaintiff admitted that there was **no invention in a one-piece projectile** [Exhibit G, B-5d, R. 172]:

“Plaintiff admits that prior to the earliest date of invention by Driggs and Faber, that there was described in printed publications and known to others in the United States.

“(d)—a projectile case having a base and substantially cylindrical side walls, of one piece of metal, the base being provided with an aperture.’ ”

Plaintiff admitted that there was no invention in a tubular projectile with an eyelet in the bottom [Exhibit G, A-6, R. 169]:

“A. 6. That more than two years prior to September 19, 1931, there was publicly used and sold in the United States—

(a)—a tubular projectile having a transversely extending bottom or base, a port in such bottom or base, and a tubular eyelet inserted in such port, the eyelet having a flange resting on the outside of the base or bottom;

(b)—the tubular projectile having a transversely extending bottom or base, a port in such bottom or base, and a tubular eyelet inserted in such port, the eyelet having a flange resting on the outside of the base or bottom, the eyelet having a reduced inner end and a fuse powder in the eyelet.

(Answer) *Plaintiff admits the allegations set forth in paragraph 6 of Defendant's Request for Admissions.*”

By these admissions plaintiff has eliminated the entire device from the field of novelty—there is nothing left. A VOID—emptiness.

IN VIEW OF THESE ADMISSIONS THE FINDINGS OF THE TRIAL COURT ARE CONTRARY TO THE EVIDENCE. Since the record conclusively shows that there is no invention, it is a travesty upon justice to have finding 9 state that the patentees “* * * devised something new and useful. They produced a new combination of old elements * * *.” Findings 9 and 13 are contrary to the admissions and to the showings of the prior art, and the judgment of the lower court must be reversed.

This Court has had occasion to previously reverse the same Trial Court because of an erroneous holding of validity where there was no invention and had clearly stated:

“* * * As stated by this circuit in *Keszthelyi v. Doheny Stone Drill Co., et al.*, 59 F. 2d 3, 8, ‘A mere difference or change in the mechanical construction in the size or form of the thing used, in order to obviate known defects existing in the previous devices, although such changes are highly advantageous, and far better and more efficacious and convenient, does not make the improved device patentable. In order to be patentable, it must embody some new idea or principle not before known. *It must, as before stated, be a discovery, as distinguished from mere mechanical skill or knowledge.*’

* * * * *

“Even though the functions performed by the combination be new and useful, this does not make the device patentable, *for it must also be invention*

and/or discovery. There must be ingenuity over and above mechanical skill. These features have been used in a similar fashion in earlier patented devices.”

Schick Service, Inc. et al. v. Jones, etc., 173 F. 2d 969.

In view of the above admonition and the uncontrovertible admissions by plaintiff, this Court is compelled to again reverse the Trial Court and hold that claims 10 and 11 are invalid.

THERE IS NO INVENTION IN MAKING A CONTAINER OR SHELL FROM ONE PIECE OF METAL.

Is it invention to substitute a one-piece shell for a two-piece shell in an old combination?

This issue is controlling, since plaintiff stated that if there was an invention it lay in making the container or shell from one piece of metal.

“The Court: Do you care to state what the new element is?

Mr. Schmieding: Yes. I believe I did that in my answer to his admission. I said the new element was a one-piece projectile shell including relatively thin side walls and a heavy base.” [R. 86.]

* * * * *

“The Court: So what troubles me here, while we can talk about a combination and limiting a device to the precise combination taught in the patent, when we analyze it we are saying that making two pieces of one is an invention.

Mr. Schmieding: That is right. * * *” [R. 159.]

This simple issue can be answered only in the negative in view of the record and common knowledge. The record shows that the patentees of the patent in suit were not the first to make a one-piece container or shell. A sworn admission of fact in evidence in this case cannot be disregarded, to wit:

“Plaintiff admits that prior to the earliest date of invention by Driggs and Faber, that there was described in printed publications and known to others in the United States—

“(d)—a projectile case having a base and substantially cylindrical side walls, of one piece of metal, the base being provided with an aperture.” [Exhibit G, R. 172.]

The Trial Court was bound by this admission, but disregarded it. The facts so admitted are substantiated by documentary evidence. Exhibit F-14 [R. 206] shows a one-piece projectile case; the projectile cases of Exhibit F-18 [R. 210] were made out of aluminum by plaintiff [R. 141].

Since a one-piece projectile case or container was old, there was no invention involved in substituting such one-piece container for a two-piece container in an old combination.

One-piece containers, whether they are cartridge cases, shells, or ordinary kitchen pots, have and have had integral bottoms and are not new; the Court cannot close its eyes to such commonplace articles.

“In deciding whether the patent covers an article the making of which requires invention, we are not

required to shut our eyes to matters of common knowledge or things in common use.”

King v. Gallun, et al., 109 U. S. 99, 101, 27 L. Ed. 870.

The antiquity of one-piece shells, cases and cartridges in the munitions field is evidenced by judicial determinations of which this Court has notice. In 1884 the Supreme Court of the United States determined that one-piece cartridge shells with a flanged bottom (for breach-loading guns) were old and not inventive.

Cartridge Co. v. Cartridge Co., 112 U. S. 624, see pp. 629, 630.

Hubbell v. U. S., 179 U. S. 77, is of interest because it deals with ammunition. The patent there in suit related to cartridges and the Supreme Court pointed out that

“Breech loading metallic cartridges were not new
* * *.” (P. 83.)

even in 1878. In 1878 the cartridges or shells described by the Supreme Court were made of one piece of metal:

“The flange and head of the metallic case are solid, all in one piece.” (P. 80.)

The description in this old Supreme Court case is applicable here:

“This cartridge is a hollow metallic shell, rimmed around the base, with a pocket in the exterior of the center of the base; through the center of the top of this pocket, supposing the cartridge to be stood upon its base or closed end, is pierced a single aperture or hole to carry the fulminate flame to the black powder chamber. * * *” (P. 84.)

There is no invention involved in making the bottom of a container or shell in one piece with the side walls. In *Howard v. Detroit Stove Works*, 150 U. S. 164, the court considered a stove whose body was a cylinder with an inwardly extending flange at the bottom, this flange supporting a grate. (In this case we have a cylindrical container having an inwardly extending bottom flange surrounding the delay fuse, the flange forming a bottom supporting the powder, parachute flare, etc.) The Supreme Court held that it was not invention to make the grate or bottom integral with the side walls, stating:

“* * * *it involves no invention to cast in one piece an article which had formerly been cast in two pieces and put together.*” (150 U. S. 170.)

The great weight of authority holds that making an article from one piece when it was formerly made of two, is only mechanical skill and not invention.

“The single question herein is whether this new construction ‘involved the exercise of the inventive faculty’. The prior art shows and the patent admits that such a lining in two pieces was old. That it does not involve invention merely to make such a lining in one piece is well settled. *Howard v. Detroit Stove Works*, 150 U. S. 164; *Standard Caster & Wheel Co. v. Caster Socket Co.*, 113 Fed. 162, 51 C. C. A. 109. Nor would the mere fact that the one-piece device was cheaper or more durable constitute invention when *such results were merely such ordinary consequences of dispensing with joints as would naturally be anticipated by the workman.* *Manufacturing Co. v. Holtzer*, 67 Fed. 907, 15 C. C. A. 63. In *Standard Caster & Wheel Co. v. Caster Socket Co.*, *supra*, the court says:

‘In *Manufacturing Co. v. Holtzer*, 67 Fed. 907, 15 C. C. A. 63, the Circuit Court of Appeals for the First Circuit held that *the right to improve on prior devices by making solid castings in lieu of attached parts is so common and universal in the arts as to cast a heavy burden upon any one claiming patentability for such an improvement to show special reasons in support of his claim.*’ ”

General Electric Co. v. Yost Electric Mfg. Co., 139 Fed. 568, 570 (C. A. 2).

“This is not to overlook the insistence for appellee that it was invention to convert the rectangular plate with a perforated flange mechanically attached into a single structure. *It is, however, settled that simply to unite two parts into an integral construction does not constitute invention* (Howard v. Detroit Stove Works, 150 U. S. 164; *Standard Caster & Wheel Co. v. Caster & Socket Co.*, 113 Fed. 162, 166, 51 C. C. A. 109); and this principle is especially applicable here, since the two parts so converted into a unitary structure could have no different relation to each other, or to other perforated parts with which they might be combined in toy building, from that which they bore when they were simply mechanically attached.
* * * It must follow that the patent is void because of the lack of invention.”

Wagner et al. v. Meccano Limited, 246 Fed. 603, 608 (C. A. 6).

The general rule was well stated by the Court in *Standard Caster & Wheel Co. v. Caster Socket Co.* (C. A. 6), 113 Fed. 162 at 166, as follows:

“The conclusion from all cases must be that mere making in one piece of a device formerly made in two parts mechanically attached is not invention.”

To the same effect see:

James Heddon's Sons v. American Fork & Hoe Co.,
148 F. 2d 230 (C. A. 6);

Cleveland Punch & Shear Works Co. v. E. W. Bliss Co., 145 F. 2d 991 (C. A. 6);

Enterprise Railway Equipment Co. v. Pullman Standard Car Mfg. Co., 95 F. 2d 17 (C. A. 7);

National Battery Co. v. Western Molded Products Co., 39 Fed. Supp. 954 (D. C. Cal.), affirmed 132 F. 2d 510 (C. A. 9).

More recently it was stated:

"In making a metal container the choice of an integral closure or a separate one gripped tightly by the walls was a mechanic's choice."

Ray-O-Vac Co. v. Goodyear Tire & Rubber Co.,
45 Fed. Supp. 927, 932, affirmed by the Supreme Court, stating:

"The choice was one between alternative means obvious to any mechanic; it did not have the quality of invention." (299 U. S. 98.)

This general rule of law is clearly applicable here. The prior patents show parachute-type flares in which there are, in combination, a cartridge case with its percussion cap and black powder and a projectile shell or container, such container having a bottom, a delay fuse in such bottom and carrying an expelling charge, flare and parachute within the container. Plaintiff cannot deny this. This old combination is clearly shown in Exhibits F-17 and F-18 [R. 209 and 210].

There is no invention involved in substituting a container with an integral unitary bottom for the two-piece

container of old patents such as Exhibits F-16, F-17 and F-18 [R. 208, 209, 210].

The elements are still in the **same relationship**; the one-piece container still functions in the same way; it still carries the flare and parachute. There is **no new or different relationship** between the projectile and the base cartridge or between the projectile or container and its contents. The percussion cap performs its old and normal function; the black powder performs its old and normal function of shooting the projectile into the sky; the height to which it is shot depends upon the kind and amount of powder used. (Note: the patent in suit does not state what powder or how much to use.) The flare and parachute will be ejected from the container by the ejection charge in the same way as in the prior patents Exhibits 16, 17, 18 and others; the color of the flare is not influenced by the construction of the container; the delay fuse acts in the **same way** whether the bottom of the container is integral with its walls or attached to the walls in some other manner.

Actually, this admittedly old combination [R. 145] is only an aggregation of old elements.

“So long as each element performs some old and well-known function, the result is not a patentable combination, but an aggregation of elements.”

Richards v. Chase Elevator Co., 158 U. S. 299, 302.

“The results must be a product of the combination, and not a mere aggregate of several results, each the complete product of one of the combined elements.”

Grinnell Washing Machine Co. v. Johnson Co., 247 U. S. 426, 62 L. Ed. 1196, 38 S. Ct. 547, 549.

“If several old devices are so put together as to produce even a better machine or instrument than was formerly in use, but each of the old devices does what it had formerly done in the instrument or machine from which it was borrowed and in the old way, without uniting with other old devices to perform any joint function, it seems that the combination is not patentable. *Hailes v. Van Wormer*, 20 Wall. (87 U. S.) 353, 22 L. Ed. 241; *Reckendorfer v. Faber*, 92 U. S. 347, 23 L. Ed. 719.”

Brinkerhoff v. Aloe, 146 U. S. 515, 516, 36 L. Ed. 1068, 13 S. Ct. 221.

Followed in:

Lincoln Engineering Co. v. Stewart-Warner Corp.,
303 U. S. 545, 549;

Bailey v. Sears & Roebuck, 115 F. 2d 904 (C. A. 9).

The substitution of a one-piece container for an older, two-piece container is not inventive. It is not invention to substitute aluminum for copper or brass in making such container.

“A substitution of one material with known characteristics for another material does not rise to the dignity of invention.”

U. S. Appliance Corp. v. Beauty Shop Supply Co., Inc., 121 F. 2d 149 (C. A. 9).

Also to the same effect see:

Heath v. Frankel, 153 F. 2d 369 (C. A. 9);

Kalich v. Paterson Pacific Parchment, 137 F. 2d 649 (C. A. 9);

Evr-Kleen Seat Pad Co. v. Firestone Tire & Rubber Co., 118 F. 2d 600.

It is to be remembered that the claims here in issue, claims 10 and 11, are **combination claims**. If the one-piece container was assumed to be new

“* * * and the claims were construed to include it, *the patent would nevertheless be invalid* for overclaiming the invention by including old elements, unless, together with its other old elements, the extension (container here) made up a new combination patentable as such.”

Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp., 340 U. S. 147 at 150.

The above case is particularly applicable here, and the following language is directly in point:

“Courts should scrutinize combination patent claims with a care proportioned to the difficulty and improbability of finding invention in an assembly of old elements. The function of a patent is to add to the sum of useful knowledge. * * * A patent for a combination which only unites old elements with no change in their respective functions, such as is presented here, obviously withdraws what already is known into the field of its monopoly and diminishes the resources available to skillful men. This patentee has added nothing to the total stock of knowledge, but has merely brought together segments of prior art and claims them in congregation as a monopoly.

* * * * *

“* * * The defect that we find in this judgment is that a standard of invention appears to have been used that is less exacting than that required where a combination is made up entirely of old components.” (340 U. S. at 152, 153 and 154.)

The only purported novelty is a “mechanic’s choice” and the only advantages are “merely such ordinary

consequences of dispensing with joints as would naturally be anticipated by the workman." Such commonplace mechanical skill is not invention. Claims 10 and 11 are invalid.

The general rule that invention must be present and that a claim is invalid if invention is not defined, is well stated in the following authorities:

"There must be ingenuity over and above mechanical skill."

Schick Service Inc. v. Jones, 173 F. 2d 969 (C. A. 9);

Keszthelyi v. Doheny Stone Drill Co., 59 F. 2d 3, 8 (C. A. 9);

Toledo Pressed Steel v. Standard Parts Inc., 307 U. S. 350.

"* * * Assuming for the moment that the Lane tool has such advantages it would not on that account be patentable. It is not sufficient that the device be new and useful. It must also be an invention or discovery."

Lane Wells Co. v. M. O. Johnston Oil Field Service, 181 F. 2d 707 (C. A. 9).

"* * * Under the statute (35 U. S. C. §31; R. S. §4886) the device must not only be 'new and useful', it must also be an 'invention' or 'discovery'. *Thompson v. Boisselier*, 114 U. S. 1, 11. Since *Hotchkiss v. Greenwood*, 11 How. 248, 267, decided in 1851, it has been recognized that if an improvement is to obtain the privileged position of a patent more ingenuity must be involved than the work of a mechanic skilled in the art. *Hicks v. Kelsey*, 18 Wall. 670; *Slawson v. Grand Street R. R. Co.*, 17 Otto 649; *Phillips v. Detroit*, 111 U. S. 604; *Morris v. McMil-*

lin, 112 U. S. 244; Saranac Automatic Machine Corp. v. Wirebounds Patents Co., 282 U. S. 704; Honolulu Oil Corp. v. Halliburton, 306 U. S. 550. 'Perfection of workmanship, however much it may increase the convenience, extend the use, or diminish expense, is not patentable.' Reckendorfer v. Faber, 2 Otto 347, 356-357. The principle of the Hotchkiss case applies to the adaptation or combination of old or well known devices for new uses. Phillips v. Detroit, *supra*; Concrete Appliances Co. v. Gomery, *supra*; Powers-Kennedy Contracting Corp. v. Concrete Mixing & Conveying Co., *supra*; Electric Cable Joint Co. v. Brooklyn Edison Co., 292 U. S. 69; Altoona Public Theaters, Inc. v. American Tri-Ergon Corp., *supra*; Textile Machine Works v. Louis Hirsch Textile Machines, Inc., 302 U. S. 490; Toledo Pressed Steel Co. v. Standard Parts, Inc., 307 U. S. 350."

Cuno Engineering Corp. v. The Automatic Devices Corp., 314 U. S. 84.

In order to have invention

"* * * More must be done than to utilize the skill of the art in bringing old tools into new combinations."

Cuno case, 314 U. S. 84, citing: *Hailes v. Van Wormer*, 20 Wall. 353, 368; *Pickering v. McCullough*, 14 Otto 310, 318; *Thatcher Heating Co. v. Burtis*, 121 U. S. 286, 294; *Concrete Appliances v. Gomery*, 269 U. S. 177 at 184-185; *Powers-Kennedy Contracting Corp. v. Concrete Mixing & Conveying Co.*, 282 U. S. 175, 186; *Carbice Corp. v. American Patents Dev. Co.*, 283 U. S. 420.

It is submitted that the Trial Court ignored the facts and disregarded the law. The evidence and the authorities compel holding claims 10 and 11 invalid.

THE PRIOR PATENTS CONCLUSIVELY SHOW LACK OF INVENTION.

Plate I of this brief has shown that all of the parts of the claimed device have been shown in the prior patents and publications, for the same purpose and in the same relationship.

Plates VI to IX demonstrate that one prior patent suggests and teaches the changes in form and deprives the patent in suit of any semblance of invention.

Plate VI illustrates a parachute flare described in **expired** patent No. 1,712,383 [Exhibit F-16, R. 208] formerly owned by plaintiff and held **invalid** by the 4th Circuit at 128 F. 2d 444. This flare was for use in a short-barreled muzzle-loading hand gun. The case has the "base with an annular groove" which is called for in claims 10 and 11.

The prior, invalid patent Exhibit F-16 states that the case may be of uniform diameter throughout, and therefore the device can be made of the form shown in Plate VII without the exercise of invention.

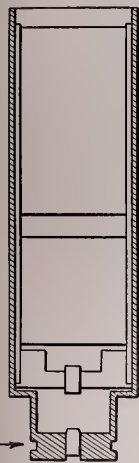
Moreover, as shown in Plate VIII, the case can be short. There is no invention involved in making a case longer or shorter. Changes in length or degree are not inventive.

The container or projectile can be made of aluminum, in accordance with the teachings of the expired, invalid patent Exhibit F-16.

In Plate VIII we have a device that answers all requirements of claims 10 and 11 except that the bottom of the container is attached to the walls and is not integral with the walls.

CHANGES IN FORM, SUGGESTED BY PRIOR ART, ARE A MECHANIC'S CHOICE AND NOT INVENTIVE

VI
Shown in Exhibit F-16
[R. 208]



Case "may be in the form of a single cylinder from end to end" [page 1, line 25 of Exhibit F-16]

VII



Container cylinder "may be made of aluminum" [page 2, line 30 of Exhibit F-16, R. 208]

VIII



Case may be short, as in Exhibit F-18 [R. 210]

IX



Bottom of container may be integral. No invention in one-piece projectile [R. 172]

This shape evolved by Clauser and not Driggs and Faber [R. 135]

Groove to permit use in muzzle-loading pistol of Exhibit F-15 [R. 207]

"In making a metal container the choice of an integral closure or a separate one gripped tightly by the walls was a mechanic's choice."

(45 F. Supp. 927, 932) Affirmed by Supreme Court as

"* * * no more than the choice of mechanical alternatives
* * *"

(*Goodyear Co. v. Ray-O-Vac Co.*, 321 U. S. 275, 278.)

But plaintiff had admitted that projectiles with integral bottoms were not new [R. 172]. Therefore the substitution of the one-piece container or projectile of Plate IX for the two-piece container of Plate VIII is not and cannot be invention.

It is to be noted that by making the changes in shape or form (and without any changes in function or result) we end up with a flare which would have been an infringement of expired patent Exhibit F-16.

Plaintiff is now attempting to extend its monopoly over the same device by claiming that it also infringes the patent in suit here. Plaintiff is stating that what is in the public domain is covered by claims 10 and 11 of the patent in suit.

It is submitted that any member of the public has the right to make flares like Plate VIII or with a container having an integral bottom. The mechanic cannot be deprived of his choice of common, alternative methods of construction.

Claims 10 and 11 are invalid for anticipation and lack of invention.

PLAINTIFF CANNOT POINT TO A NEW RESULT. THE OLD COMBINATION IS INVALID.

In a frantic effort to salvage claims 10 and 11, plaintiff fruitlessly attempted to discover some novelty in result, since there was no novelty in the combination of elements defined by the claims. These tactics caused delay and confused the Trial Court, but cannot save an invalid claim, since a patentee is bound by the language of his claim.

Claims "measure the invention" and set the limits beyond which the patentee cannot go.

Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 419;

General Electric Co. v. Wabash Appliance Corp., 304 U. S. 364, 369;

Keystone Bridge Co. v. Phoenix Iron Co., 95 U. S. 274, 278.

"Our law requires the patentee to specify particularly what he claims to be new, and if he claims a combination of certain elements or parts, we cannot declare that any one of these elements is immaterial."

Water Meter Co. v. Desper, 101 U. S. 332, 337.

Claims 10 and 11 here on appeal are combination claims; they must be subjected to close scrutiny. The recent expressions of the Supreme Court, in the light of the facts here of record, show that claims 10 and 11 are invalid, because each element has been previously used in the same

arrangement, for the same purpose, and plaintiff cannot point to a single additional or different function.

“* * * The concept of invention is inherently elusive when applied to combination of old elements.

* * * * *

“* * * The conjunction or concert of known elements must contribute something; only when the whole in some way exceeds the sum of its parts is the accumulation of old devices patentable. * * * This case is wanting in any unusual or surprising consequences from the unification of the elements here concerned, and there is nothing to indicate that the lower courts scrutinized the claims in the light of this rather severe test.

* * * * *

“Courts should scrutinize combination patent claims with a care proportioned to the difficulty and improbability of finding invention in an assembly of old elements.”

Great Atlantic & Pacific Tea Company v. Supermarket Equipment Corporation, 340 U. S. 147, 151, 152.

“Patents on machines which join old and well-known devices with the declared object of achieving new results, or patents which add an old element to improve a pre-existing combination, easily lend themselves to abuse. And to prevent extension of a patent’s scope beyond what was actually invented, Courts have viewed claims to combinations and improvements or additions to them with very close scrutiny. *Cf. J. Lincoln Engineering Co. v. Stewart-Warner Corp.*, 303 U. S. 545, 549-51.”

Halliburton Oil Well Cementing Co. v. Walker, 329 U. S. 1.

This Court has repeatedly held combination claims invalid.

“There was no new function performed by the combination. The function performed was merely to indicate the location of the rotor blades, as in prior devices. Hence it was not patentable as a combination of old elements. (Citing cases.) What we have here is an aggregation of parts assembled by mere mechanical skill.”

Bailey v. Sears, Roebuck & Co., 155 F. 2d 904 (C. A. 9), cert. denied 314 U. S. 616.

To the same effect see:

Goodman v. Paul E. Hawkinson, 120 F. 2d 167 (C. A. 9);

Magarian v. Detroit Products Co., 128 F. 2d 544 (C. A. 9);

Mettler v. Peabody Engineering Co., 77 F. 2d 56 (C. A. 9);

Grinnel Washing Machine Co. v. Johnson Co., 247 U. S. 426, 438.

Plaintiff's expert attempted to dramatize the trial by creating the impression that the patent related to a combination of a sinking ship, a life raft, a parachute flare and a rescue vessel twenty-five miles away. An interesting picture, but it has nothing to do with the merits of the patent in suit.

Plaintiff tried to state that its flares are shot 150 feet or more into the air; prior patent No. 1,785,770 [Exhibit F-19, R. 211] states that the parachute is expelled “Say when the projectile is **one hundred and fifty feet** in the air, * * *.” [P. 2, lines 1 and 2.] Obviously, the height

to which the flare is shot depends upon the kind and amount of powder used, and the use of more or less powder is a matter of degree and not invention.

“The Court: You would not claim any invention after putting powder in there in order to discharge the projectile at a greater height?

Mr. Schmieding: No.” [R. 159.]

Plaintiff’s expert stated that one advantage of the one-piece projectile container lay in that there was less possibility of leakage of gases or flash of fire through cracks or crevices during firing [R. 116]. In defining what he meant by a crevice or crack he stated:

“That is just simply an aperture due to *faulty mechanics* or construction which would permit the passage of a spark” [R. 117.]

Since 1878 cartridge manufacturers have known that such “faulty mechanics” can be overcome by a one-piece shell. (See *Hubbell v. U. S.*, 179 U. S. 77 at 80, 84 and *Cartridge Co. v. Cartridge Co.*, 112 U. S. 624.) Actually, as long as the bottom of the projectile or container is well connected, it will function.

“Q. (By Mr. Miketta): Irrespective of what material we are using, Dr. Clauser, if we had a projectile shell in the form of a metallic tube, and you attached a *separate bottom* on that tube, either by screwing it on or welding it on, as long as you made sure that you had a *tight joint* between that bottom and the walls of that projectile shell, *wouldn’t that answer the requirements and prevent flash?* A. **It would** as long as you get it to the point where you get it absolutely tight.” [R. 138.]

The only advantages then, are

“* * * merely such ordinary consequences of dispensing with joints as would naturally be anticipated by the workman.”

General Electric Co. v. Yost Electric Mfg. Co., 139 Fed. 568, 570 (C. A. 2).

Even thirty years ago it was known that a lighter, stronger and cheaper article could be made by making it out of one piece instead of two. Invention, which must involve more than the expected skill of the artisan, cannot be predicated upon such flimsy ground.

Realizing that the one-piece container was not adequate basis upon which the patent could be sustained, plaintiff's counsel and his expert insisted that the gradually tapered shape of the eyelet delay fuse was new [R. 132], stating that dome-shaped eyelets were old, but

“* * * they do not function the same as this tapered eyelet with the elongated restriction.” [R. 132.]

Clauser insisted that this tapered shape was “very very important” [R. 121]; the device would not function with any other shape [R. 133].

This argument shows that the patent in suit is **invalid** because

(1) The shape of the eyelet was developed by experience of Clauser while he was with Triumph Explosives, long prior to the filing of the patent in suit [R. 134-135]. This shape was not invented by Driggs and Faber.

(2) The patent in suit and claims 10 and 11 do **not call for a tapered eyelet**. The claims are invalid because they fail to define the purported invention.

“* * * Congress requires of the applicant ‘a distinct and specific statement of what he claims to be new, and to be his invention.’ Patents, whether basic or for improvements, must comply accurately and precisely with the statutory requirements as to claims of invention or discovery. The limits of a patent must be known for the protection of the patentee, the encouragement of the inventive genius of others and the assurance that the subject of the patent will be dedicated ultimately to the public. The statute seeks to guard against unreasonable advantages to the patentee and disadvantages to others arising from uncertainty as to their rights. The inventor must ‘inform the public during the life of the patent of the limits of the monopoly asserted, so that it may be known which features may be safely used or manufactured without a license and which may not.’ The claims ‘measure the invention.’”

General Electric Co. v. Wabash Appliance Corp., et al., 304 U. S. 364 at 369.

Claims have been held indefinite for these reasons in many cases, among them the Supreme Court cases mentioned hereinabove, as well as:

United Carbon Co. v. Binney & Smith Co., 317 U. S. 228;

Kruger v. Whitehead, 153 F. 2d 238 (C. A. 9);

Timken Detroit Axle Co. v. Cleveland Steel Products Co., 138 F. 2d 267 (C. A. 6); cert. den. 326 U. S. 725; rehearing den. 326 U. S. 808;

Waterhammer Arrester Corp. v. Tower, 156 F. 2d 775 (C. A. 7).

PLAINTIFF IS CHALLENGED to point out wherein the old elements of the old combination described in claims 10 and 11 produce a “new or different function or operation than that theretofore performed or produced by them” as required by all of the authorities, including:

Lincoln Engineering Co. v. Stewart-Warner Corp.,
303 U. S. 545 at 549;

Cuno Engineering Corp. v. Automatic Devices Corp., 314 U. S. 84;

Toledo Pressed Steel Co. v. Standard Parts, Inc.,
307 U. S. 350;

Great A. & P. Tea Co. v. Supermarket Equipment Corp., 340 U. S. 147.

The only conclusion which can be reached is that the claims of the patent in suit are **invalid for lack of invention, and for aggregation** of parts without the production of different results.

CLAIMS 10 AND 11 ARE FOR AN INOPERATIVE, INCOMPLETE AGGREGATION OF OLD ELEMENTS.

The attention of the Court is called to the fact that claim 11 set out in full and illustrated in Plate II is for an incomplete, inoperative assemblage of elements. Claim 10 even more drastically fails to define an operative device, because it leaves out the “detachable closure means.”

Claim 11 does not define a complete flare because:

(1) It does not include a cable to connect the parachute to the flare, nor require the use of gas checks, nor the use of the wooden annulus surrounding the expelling charge in the shell, such annulus being **very**

important according to testimony of plaintiff's witness Clauser [R. 119-120].

(2) It does not state how thin the walls of the shell may be, nor how thick the base of the shell should be [Exhibit G, R. 181].

(3) It does not state the kind and amount of powder to be used in the propelling charge; some powders may be sufficiently strong to burst the cartridge and the gun from which it is fired.

(4) It does not require that the delay fuse may have the tapered end deemed **essential** by plaintiff's witness Clauser [R. 121, 132, 133, 134].

Since claims 10 and 11 do not include elements which were represented as "very, very important" or essential to the operation of the device, the Trial Court is in grievous error in holding that the patentees have devised and claimed something "new and useful."

CLAIMS 10 AND 11 ARE INVALID BECAUSE THEY CLAIM MORE THAN WAS IN- VENTED.

If it be assumed, for purposes of discussion only, that Driggs and Faber actually invented a new, specifically tapered delay fuse eyelet, or a one-piece container with an integral bottom, **they did not claim their improvement as such**, and therefore the claims are void and invalid. The applicable rule of law is well stated in the following cases:

"As we said of Gullborg in the Rogers case, having hit upon this improvement *he did not patent it as such* but attempted to claim it in combination with other old elements which performed no new function in his

claimed combination. *The patent is therefore void as claiming more than the applicant invented.* The mere aggregation of a number of old parts or elements which, in the aggregation, perform or produce no new or different function or operation than that theretofore performed or produced by them, is not patentable invention. And the improvement of one part of an old combination gives no right to claim that improvement in combination with other old parts which perform no new function in the combination.”

Lincoln Co. v. Stewart-Warner Corp., 303 U. S. 545 at 549.

“* * * Secondly, he invented an improved form of coupler to be attached to the end of the hose leading from the pump to the fitting. Instead of patenting this, as he did the pin fitting, he claimed a combination of pump, hose-coupler, and pin fitting, and embodied in the combination his improved form of coupler. * * * The question then is whether, by this method, the patentee, by improving one element of an old combination whose construction and operation is otherwise unchanged, may, in effect, repatent the old combination by reclaiming it with the improved element substituted for the old element. That this cannot be done is shown by numerous cases in this and other federal courts.”

Bassick Co. v. Hollingshead Co., 298 U. S. 415 at 424-425.

The many prior patents issued to Driggs and Faber show that plaintiff had attempted to cover every minute modification, and thereby prevent competition. The patent in suit was the last of a long line of patents. The patent in suit is a “rehash” of the same subject, as an old and exhausted combination. The above rules of law require that the patent in suit be held invalid.

DEFENDANT DOES NOT INFRINGE.

The patent in suit had twenty-three claims and twenty-one of the claims (1-9 and 12-23) have been held invalid. This emphasizes the specific and limited character of claims 10 and 11 here on appeal. **Details of construction and limitations appearing in these claims cannot be disregarded**; the construction called for in these claims must be found in defendant's flare, Plaintiff's Exhibit 2 charged to be the infringing device.

Your Honors will note that defendant's flare [Exhibit 2 and Exhibit 25] is designed for use in a breech-loading gun; these flare shells have the common outwardly extending flange or lip at the base which positions the shell within the breech and precludes the insertion of the shell through the muzzle of the gun.

Claims 10 and 11 call for a combination which very specifically defines, as an essential element

“a cartridge case having a base with an annular groove.”

It is settled that a claim for a combination must be limited to the particular combination of elements defined in the claim, and all of the elements are material.

I. T. S. Rubber Co. v. Essex Rubber Co., 272 U. S. 429;

Hubbell v. U. S., 179 U. S. 77, 82;

Schumacher v. Cornell, 96 U. S. 549, 554;

Vance v. Campbell, 66 U. S. 427.

“* * * it is undoubtedly true that the patentees in a suit for infringement must be limited to what is specified in the claims annexed to the specification.”

Brooks v. Fiske, 15 How. (56 U. S.) 212, 215;

Bates v. Coe, 98 U. S. 31, 38.

Defendant does not use “a base with an annular groove.” Defendant does not infringe.

Claims 10 and 11 are directed to a muzzle-loading shell; defendant does not make muzzle-loading shells. It is impossible to insert defendant’s Exhibit 2 through the muzzle of the gun in which such shells are normally fired.

Counsel for plaintiff admitted during trial that claim 10 covers a muzzle-loading arrangement shown in Fig. 4 of the patent—

“The Court: That is a muzzle-loading arrangement, Fig. 4.

Mr. Schmieding: That is a muzzle-loading arrangement.” [R. 148.]

Plaintiff’s expert, Clauser, and plaintiff’s former president, Hubbard, also defined a shell having an annular groove as a muzzle loader.

“Q. And therefore, Fig. 4 really relates to a muzzle-loading shell which is of the type which you say was used from aircraft? A. Yes, sir, that’s definitely an aerial shell.” [R. 143.]

“Q. When it has the annular groove near the bottom, then it is a muzzle-loading flare? A. That is essentially correct.” [R. 97.]

The annular groove is specifically designed to permit the shell to be used in the pistol of patent No. 1,712,382 [Exhibit F-15, R. 207], which is stated to be a “* * * hand-operated muzzle-loading firearm.” Shells with such annular groove, and without defendant’s flange, **could not be used** in the guns approved by the United States Coast Guard and described on page G-10 of Exhibit E.

It is clear that the limitation “a cartridge case having a base with an annular groove” is an important limitation, inserted into claims 10 and 11 for the purpose of specifically limiting these claims to a muzzle-loading device. The entire mode of operation of the device is changed by reason of such limitation.

Defendant does not use this construction and therefore does not infringe.

In the instant case it appears that the Trial Court has construed the claims in an unwarranted and improper manner. It is improper to rewrite a claim. The decree of the Trial Court is in error because

“It attempts, not merely to correct a clerical or typographical error, but *to rewrite the claim* and thus enlarge the patent beyond the scope of that which the inventor claimed and the Patent Office allowed. *This the courts have no right to do.*”

Reinharts, Inc. v. Caterpillar Tractor Co., 85 F. 2d 628 (C. A. 9), citing:

McClain v. Ortmyer, 141 U. S. 419, 424;

Keystone Bridge Co. v. Phoenix Iron Co.,
95 U. S. 274, 278;

Merrill v. Yeomans, 94 U. S. 568, 573.

“There can be no infringement of a void patent and a patent which shows neither invention nor discovery is void.”

Dunbar v. Myers, 94 U. S. 187;

Thompson v. Baisselier, 114 U. S. 1;

Saranac Machinery Co. v. Wire Bounds Co., 282 U. S. 704.

Finding 15 of the Trial Court is **contrary to the facts** as shown by the testimony and exhibits of record. There is absolutely no basis whatsoever for the statement: "The infringement by defendants has been and is conscious, deliberate and willful." This last expression is uncalled for, contrary to the record, and appears to be an abuse of discretion. Defendant and defendant's counsel have presented the facts and the authorities in support of their convictions, but this does not excuse such excessive and inordinate language, particularly where the facts definitely sustain defendant's position.

The above circumstances compel defendant to ask that this Court either award costs and attorneys' fees to defendant or reverse the Trial Court and remand the case for determination as to amount of attorneys' fees to be awarded defendant.

OBVIOUSLY ERRONEOUS FINDINGS MUST BE OVERHAULED.

A trial court is under duty to make findings of such character that the basis of the decision reached can be readily understood on appeal. This was called to the attention of the Trial Court [R. 43] and defendant had suggested findings which would be in accordance with the evidence.

Defendant had objected to proposed findings 10 and 11 [R. 36] which were subsequently embodied in large part by the Court in its findings 9 and 10 [R. 67] and defendant's objections and suggested alternatives were set out in full [R. 49-51]. The Trial Court ignored the factual basis of defendant's objections.

We are faced with findings which are a statement of conclusions; the findings, such as 9 and 10, do not identify

what was the “new result” or the “new combination” because there was **no** “new result” and there is **no** “new combination.” The findings are generalized and uninforming because they are based upon an inference and not on fact. They do not state what constitutes an invention.

“It is not sufficient that the device be new and useful. It must also be an invention or discovery.”

Lane Wells Co. v. M. O. Johnston Oil Field Service,
181 F. 2d 707 (C. A. 9).

The situation here is identical to that which caused the Supreme Court to comment (in holding a patent invalid):

“Neither court below has made any finding that old elements which made up this device perform any additional or different function in the combination than they perform out of it.”

Great A. & P. Tea Co. v. Supermarket Equipment Corp., 340 U. S. 147.

Because of the burden of work, this Court should not be faced with the necessity of examining the detailed facts. However, when faced with generalized, erroneous findings, this Court has not hesitated to examine the facts and reverse the Trial Court.

“However, this court has not hesitated when convinced that a device showed neither novelty nor invention to so hold notwithstanding findings to the contrary by the trial court. See *Motoshaver, Inc. v. Schick Dry Shaver*, 1940, C. A. 9, 112 F. 2d 701; *Madsen Iron Works v. Wood*, 1943, C. A. 9, 133 F. 2d 416; *Wilson v. Byron Jackson Co.*, 1943, C. A. 9, 133 F. 2d 644; *Schnitzer v. California Corrugated Culvert Co.*, 1944, C. A. 9, 140 F. 2d 275. And see, *Altoona Theaters v. Tri-Ergon Corp.*, 1935, 294 U. S.

477; Paramount Publix Corp. v. Tri-Ergon, 1935, 294 U. S. 464; Universal Oil Products Co. v. Globe Oil and Refining Co., 1944, 322 U. S. 471, 473; Stuart Oxygen Co. v. Josephian, 1947, C. A. 9, 162 F. 2d 857.”

Pointer v. Six Wheel Corp., 177 F. 2d 153 (C. A. 9).

Defendant has presented, in this brief, the basic facts and evidentiary matter which **compels a finding of lack of invention and a finding of no infringement**. These facts have been presented as concisely as possible in order to facilitate action by this Court. Defendant hopes that the showing has been made without impugning the sincerity of the Trial Court. Defendant is confident that the facts compel reversal of the Trial Court.

DEFENDANT SHOULD BE AWARDED COSTS AND REASONABLE ATTORNEYS' FEES.

In view of the glaring error of the Trial Court in holding claims 10 and 11 valid and in finding infringement where no infringement exists, Sections 4-9 of the Judgment [R. 73] must be reversed, and the injunction which was issued must be discharged.

It is respectfully submitted that the Trial Court not only erred in finding infringement, but abused its discretion in assessing costs against defendant [Section 7 of Judgment, R. 73] and in indicating a desire to impose increased damages and attorneys' fees upon defendant [Section 8 of Judgment, R. 74]. This “relief” goes **beyond the prayer** of the complaint [R. 8].

On the contrary, it is earnestly contended that defendant is entitled to costs and attorneys' fees both below and on this appeal, for the following reasons:

- (1) The action was not brought in good faith. Plaintiff knew that the Fourth Circuit, in speaking of the patent in suit, stated:

“The validity of the patent is not free from doubt, but the question need not be decided here; * * *”

Triumph Explosives, Inc. v. Kilgore Mfg. Co., 128 F. 2d 444.

Plaintiff first accused defendant of infringing all twenty-three claims, caused defendant to prepare its defense accordingly, and then reduced the claims piecemeal.

Plaintiff admitted, at the end of the trial, that claims such as 1 were anticipated by Exhibit F-3 [Tr. p. 321]; there voluntarily admitted that claims 6 and 12-23 were not infringed; then admitted that claims 7 and 8 were invalid [R. 154]; then admitted claim 6 was invalid [R. 154]; and finally admitted that claims 12-23 were invalid [R. 155].

A plaintiff who readily admits invalidity of the majority of claims of its patent did not bring the action in good faith. The prior art was of record two years before trial.

- (2) Plaintiff, by its admissions made two years before trial, had stripped the patent of any pretense of invention or validity. To assume that plaintiff's counsel did not know the import of plaintiff's sworn admissions would necessitate questioning such counsel's ability.

- (3) Plaintiff attempted to repudiate its admissions and throughout the trial engaged in evasive and dilatory tactics.
- (4) Plaintiff took unnecessary depositions in Ohio and caused defendant to assume needless expense. The depositions showed that records were in existence, but such records were not produced [R. 95, 99, 105]. Some depositions were not introduced into the record.
- (5) Baseless assertions were made during trial and in various pleadings. Plaintiff disregarded rules of court; evasive answers and silly contentions imposed a great burden on defendant.
- (6) These confusing tactics not only delayed and prolonged proceedings but resulted in confusion of the Trial Court and a miscarriage of justice. Such tactics should not be encouraged; instead, the provisions of 35 U. S. C. A., Section 70, should be invoked and defendant's prayer to attorneys' fees and costs [R. 30] should be granted.

In the instant case, although the Trial Court did not assess any specific sum as attorneys' fees against defendant, the Court indicated its temper in Sections 6, 7 and 8 of the Judgment [R. 73-74]. This Court is therefore in position to reverse the Judgment, hold the patent invalid and not infringed, and direct the Trial Court to award attorneys' fees to defendant, in an amount to be determined by the Trial Court. Such procedure would effectuate the Congressional intent of 35 U. S. C. A., Section 70:

"The provision is also made general so as to enable the court to prevent a gross injustice to an alleged infringer."

Here, defendant did not infringe; defendant was not guilty of unfair competition; defendant's counterclaim for declaratory judgment holding all claims invalid was successful in that plaintiff admitted that claims 6 and 12 to 23 were invalid and officially disclaimed these claims after trial [note disclaimer to Plaintiff's Exhibit 1, R. 191]. Defendant is therefore entitled to the protection of 35 U. S. C. A., Section 70, pursuant to Congressional intent, and should be awarded attorneys' fees and costs as between solicitor and client, in accordance with long standing practice (*Guardian Trust Co. v. Kansas City Southern Ry. Co.*, 28 F. 2d 233, 240-246 (C. A. 8)).

SUMMARY AND CONCLUSION.

In order to save this Court's time, defendant-appellant has presented the matter concisely. The plates should be helpful in graphically summarizing controlling points and in crystallizing the issues.

The record unequivocally establishes:

- (1) That the patent in suit is in a crowded art. The patentees were professional inventors, obtaining numerous patents on very minor modifications of the same device. Their prior, expired patents were held invalid by the Fourth Circuit.
- (2) The only possible novelty lay in the use of a container having an integral bottom instead of a separate bottom grasped by the walls of the container. **This is a mechanic's choice and not invention**, particularly since one-piece shells of various kinds had been shown in the prior art.

- (3) The sworn admissions of plaintiff, as well as the clear teachings of the prior art, make it impossible to find invention in claims 10 and 11 of the patent in suit.
- (4) Claims 10 and 11 are invalid because:
 - (a) They do not define invention.
 - (b) They are for an old combination of parts, each part performing the same function and result as it performed in prior patents.
 - (c) They are for incomplete and inoperative combinations; they do not define invention with the certainty required by R. S. 4888 (35 U. S. C. A. 33).
 - (d) They are not limited to the alleged novelty but instead attempt to cover elements and combinations which are in the public domain.
- (5) Claims 10 and 11 are specifically limited to a muzzle-loading shell. **Defendant has not made a muzzle-loading shell and has not used the construction defined in these claims.** Defendant has not infringed.
- (6) The findings and conclusions of the Trial Court are contrary to the evidence and the law. The findings fail to define wherein invention can be found.
- (7) Obviously erroneous findings cannot be permitted to stand. There is no excuse for a finding of willful and deliberate infringement when in fact there was no infringement.

- (8) The record shows that plaintiff did not bring the action in good faith, and made representations which were contrary to express admissions. Plaintiff's baseless assertions, vacillating action and repudiation of admissions unnecessarily prolonged trial and imposed an unnecessary burden on defendant. The apparent confusion of the Trial Court, resulting in an erroneous judgment, was largely attributable to plaintiff's tactics. Defendant should be awarded costs and attorneys' fees both below and on appeal.
- (9) The judgment of the Trial Court should be reversed by holding claims 10 and 11 invalid and not infringed, and by awarding costs and attorneys' fees to defendant.

Dated at Los Angeles, California, this 20th day of June, 1951.

Respectfully submitted,

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Attorneys for Defendants-Appellants.

No. 12884

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CENTRAL FRUIT & VEGETABLE Co., and WEST TEXAS
PRODUCE COMPANY,

Appellants,

vs.

ASSOCIATED FRUIT DISTRIBUTORS OF CALIFORNIA, RAY-
MOND M. CRANE, RED LION PACKING COMPANY and
JOHN C. KAZANJIAN,

Appellees.

Brief of Appellee Raymond M. Crane, Doing Business
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No. 12884

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CENTRAL FRUIT & VEGETABLE Co., and WEST TEXAS
PRODUCE COMPANY,

Appellants,

vs.

ASSOCIATED FRUIT DISTRIBUTORS OF CALIFORNIA, RAY-
MOND M. CRANE, RED LION PACKING COMPANY and
JOHN C. KAZANJIAN,

Appellees.

Brief of Appellee Raymond M. Crane, Doing Business
as Associated Fruit Distributors of California.

In this proceeding complainants sought to recover damages from respondents for failure to deliver ten cars of grapes in accordance with an alleged contract. For brevity, respondent Raymond M. Crane, doing business as Associated Fruit Distributors of California, will be hereafter referred to as "Crane" and respondent John C. Kazanjian, doing business as Red Lion Packing Company, will be referred to as "Kazanjian."

Complainants contended and alleged that "respondents, by contract in writing * * * contracted to sell to complainants ten carloads of government inspected U. S. No. 1 emperor grapes * * *" [Tr. pp. 17, 18]; "that the complainants were also to pay \$50.00 per car buying

service for the respondent, Associated Fruit Distributors of California * * *” [Tr. p. 18]; that one Jay Margules, doing business as Southwest Brokerage Company, acted “as agent for both complainants and respondents and that the respondent, Associated Fruit Distributors of California, was acting for and on behalf of itself and as agent for and on behalf of the respondent, Red Lion Packing Company.” [Tr. p. 19, par. 5.]

Respondent Kazanjian denied that Jay Margules, doing business as Southwest Brokerage Company, acted as an agent in any manner for him in negotiating any purchase or contract and denied that Associated Fruit Distributors of California was acting on behalf of, or as agent for, Red Lion Packing Company in any negotiations whatsoever. [Tr. p. 34, par. 2.]

Respondent Crane answered complainants’ complaint denying paragraph 4 thereof wherein it was alleged that said respondent contracted to sell said grapes and said respondent affirmatively alleged that it contracted to procure for complainants’ account, rather than to sell to complainants, the grapes in question and that said respondent was to receive compensation of \$50.00 per car from complainants and that respondent was acting as agent for complainants, and denied that respondent was acting for itself and as agent for Red Lion Packing Company, but on the contrary alleged that it was acting for the complainants. [Tr. pp. 38, 39, pars. 4, 5.]

On the pleadings above outlined this proceeding went to hearing before the Secretary of Agriculture and an order was made against the respondent Kazanjian and dismissing the proceeding as to respondent Crane. [Tr. p. 63.]

Respondent Kazanjian appealed to the District Court at Los Angeles and prior to the trial respondent Crane filed an amended answer [Tr. pp. 64-68] realleging that he was not acting as principal or seller or as agent for the principal or seller, but as procuring broker or buying agent for the complainants [Tr. p. 65], that he submitted complainants' offer to Kazanjian and he accepted said offer and ratified same [Tr. pp. 65, 66]; that the terms of the alleged transaction were never definitely agreed upon [Tr. p. 66]; that the alleged contract was in violation of the Statute of Frauds [Tr. pp. 66, 67] and that the contract contended for by complainant was in violation of the Emergency Price Control Act of 1942 and therefore void, which said latter defense was presented upon the assumption that respondent Crane was acting as a principal or as agent for Kazanjian and upon the further assumption that said alleged contract was entered into by respondent Crane as principal, or by respondent Kazanjian as principal. [Tr. pp. 67a, 68.]

At the trial of this action before the Department and before the District Court, Crane contended (1) that he was a procuring broker or buying agent for the complainants, and (2) that as agent for the complainants he was not liable for default on the part of Kazanjian to deliver.

On a trial *de novo* before the District Court the proceeding was dismissed as to both respondents.

In complainants' attack upon the decision of the District Court they contend that the evidence does not sustain the findings of the Court. The first assignment of error in this regard deals with the question of the status of Crane as a broker. This contention of error will be first considered by us.

**Answer to Contention That the District Court Erred
in Holding That Crane Was Solely the Agent of
Appellants.**

The District Court made detailed findings of fact covering the transaction between the parties and found that respondent Kazanjian refused to employ respondent Crane to act as his broker or agent in the sale of grapes for the 1944 grape season, for the reason that there was a ceiling price on grapes and a very active market so that Kazanjian did not need a broker or agent to secure customers for his grapes. [Tr. pp. 71-73, par. III.]

The Court further found that "In the transactions involving the proposed sale of ten carloads of grapes by respondent * * * Kazanjian to" complainants "the respondent Crane * * * acted as buying broker and agent for said complainants." [Tr. p. 78, par. VII.]

It will be remembered complainants alleged in their complaint that Crane was acting for himself and as agent for Kazanjian. [Tr. p. 19, par. V.]

Nowhere in the pleadings did complainants allege Crane was acting as their agent or as agent for both parties.

We submit that the findings of fact on the question of agency are supported by substantial evidence.

**The Complainants' Own Testimony Shows
That Crane Was Their Agent.**

There was received in evidence on the offer of complainants the testimony taken at the hearing before the Department of Agriculture. [Tr. p. 130, Compts. Ex. 5.]

A part of this evidence was the testimony of Joe Mosesman, one of the partners of Central Fruit and

Vegetable Company. [Tr. pp. 367, also pp. 16, 17, par. 1.] Mr. Mosesman testified that he was connected with the Central Fruit and Vegetable Company [Tr. p. 367], that he handled the transaction in question on behalf of Central Fruit and the West Texas Produce Company and first contacted the Southwest Brokerage Company—that is, Jay Margules. [Tr. p. 368.]

On cross-examination by Mr. Wackerbarth [Tr. p. 383] Mr. Mosesman testified: That he agreed with Mr. Margules to pay Crane his \$50.00 procurement charge; that he was willing to pay Crane a \$50.00 fee for getting these cars for him; that he knew Crane was going to try to get these various cars for him, and he knew that he was going to pay Crane \$50.00 a car for getting these cars for him; that Mr. Margules told him that and he was agreeable to paying that [Tr. p. 392]; that he knew Crane was trying to get some grapes for him and on the morning of October 3rd he knew that Crane was trying to get ten cars of Emperor grapes for him from Red Lion Packing Company and it was satisfactory to him for Crane to try and get the grapes for him. [Tr. pp. 395-6.]

On cross-examination by Mr. Aynesworth [Tr. p. 408] Mr. Mosesman testified as follows:

“Q. In view of the fact that this agreement here, which is attached as a part of the pleading as Exhibit 2 on the complaint—I notice that that is made with Associated Fruit Distributors, and so forth—it was your understanding, was it not, that you were to send that money, the initial deposit, and so forth, to the Associated Fruit Distributors? A. Yes, sir.

Q. And then depend upon them to transmit it—if the Red Lion were the people supplying you with

the grapes, that they would transmit it in turn to the Red Lion Packing Company? A. Yes, sir.

Q. You of course regarded Mr. Crane, that is, the Associated Fruit Distributors, as acting for you and as your employee in procuring this fruit for you, didn't you? A. Well, yes.

Q. And he and the Southwest Brokerage Company were both acting for you in trying to procure grapes, were they not? A. That's right. [Tr. p. 410.]

On cross-examination by Mr. Wackerbarth, Mr. Mosesman further testified as follows:

“Q. Mr. Aynesworth asked you as to whether or not you regarded Crane as acting for you, and you said that you did. That was your statement, wasn't it? A. Yes, sir.

Q. And that was correct, wasn't it? Your statement was correct, wasn't it? A. Yes, sir. [Tr. p. 413.]

On re-cross examination by Mr. Wackerbarth, Mr. Mosesman testified that he was going to pay Associated \$50.00 a car “to secure the grapes, I suppose” and it didn't make any difference to him from whom they would get the grapes as long as they got the grapes they could get them from anybody they could get them from, and on that deal he was to pay Associated \$50.00 for their services in getting these grapes. [Tr. p. 418.]

On re-cross examination by Mr. Aynesworth Mr. Mosesman testified that at the time he was called in to approve this contract he knew that Associated expected him to pay them for their services in procuring these grapes and at the time when he was paying them \$50.00

he thought they were rendering a service for him in procuring the grapes. He further testified as follows:

“Q. And you in that way considered them your agents in procuring grapes for you, didn’t you? A. Yes, sir. [Tr. p. 419.]

Harry Bockstein, a partner in West Texas Produce Company [Tr. p. 17] testified on cross-examination by Mr. Wackerbarth, as follows [Tr. p. 148]:

“I understood I was to pay Associated \$50.00 a car and my understanding as to why we were paying it is that it was a buying brokerage; it wasn’t definitely specified to me whether he was procuring it or if he was acting for the shipper; the only thing I knew I had to pay \$50.00 a car to Crane as a procurement charge; I found that out before October 3rd when I gave Southwest Brokerage instructions to buy; on October 2nd I knew Red Lion owned the grapes; I didn’t know whether Mr. Crane had to contact Red Lion in connection with this sale. [Tr. pp. 148, 149, 150.]

Clearly the complainants’ own testimony showed that Crane was their agent.

Respondents’ Evidence Showed That Crane Was the Agent of Complainants.

Raymond M. Crane, called on behalf of respondents, testified on direct examination by Mr. Wackerbarth, as follows [Tr. p. 189]:

“Q. (By Mr. Wackerbarth): Now, Mr. Crane, among the produce trade is there such a relationship that is known as buying broker? A. Yes, sir.

Q. What are the duties of a buying broker among the produce trade? A. The duties of a buying bro-

ker is to contact shippers and procure and secure merchandise for buyers.

Q. Under those circumstances who pays the buying broker? A. The buyer.

Q. And is there any established practice of custom among the produce trade as to whose agent a buying broker is? Just answer that yes or no. A. Yes.

Q. What is that practice or custom? A. In those respects he is the agent of the buyer.

Q. And in this particular instance were you acting as the agent of the buyer? A. Yes, sir. [Tr. pp. 203-204.]

Raymond M. Crane testified by deposition, introduced in evidence, as follows [Tr. p. 300]: On September 26, 1944, and October 2, 1944, we were soliciting business from brokers as their procurement agent or broker, which is our normal business. In charging \$50.00 as a procurement charge it was our intention that the fee was to be paid to us as agent of the buyers in connection with procuring these grapes. [Tr. p. 303.] At that particular time it was a matter of common practice and custom for us to solicit other brokers to use our services as a procurement agent and pay for same. [Tr. p. 306.] It was a very common practice for the broker to act for the buyer and pay a brokerage procurement charge. That is the only way the broker could exist because ceilings were set and the buyer was entitled to hire anyone he wanted to buy for him if he wanted the merchandise. [Tr. p. 307.]

**Respondents' Evidence Showed That
Crane Was Not the Agent of Kazanjian.**

John C. Kazanjian, one of the respondents, testified as follows [Tr. p. 170]: I never had any idea that Crane had sent out the telegram of September 26, 1944. [Tr. p. 181.] Crane never told me who he was doing business with. [Tr. pp. 184-185.] I did not have any control or direction over what Crane did, or acted or negotiated—absolutely not, and in this particular deal there was no agreement on my part to pay any commission whatsoever to Crane. [Tr. pp. 359-360.]

Respondent Raymond M. Crane testified as follows [Tr. p. 221]: I did not have any agreement of any character with Kazanjian for the payment to me of a commission in connection with the sale during 1944 when the ceiling was on. [Tr. p. 239.]

The foregoing quoted evidence, particularly the evidence of the complainant Joe Mosesman and the complainant Harry Bockstein, shows without doubt that Crane was acting as the agent of the complainants, and the evidence of Crane and Kazanjian shows that Crane was not acting as the agent of Kazanjian.

**A Broker Is the Agent of the
Person Who Pays His Compensation.**

“Buying broker” and “procuring agent” are terms used in the produce business.

The Produce Reporter Blue Book, which is a publication followed by the produce industry, contains the following:

“‘Buying Brokers’ are special agents with authority to purchase—limited to direct instructions

from their principals, and to those incidental powers which are reasonable and necessary for the accomplishment of the object of the agency.”

In a case decided by the Secretary of Agriculture and reported in 6 A. D. 928 (Agricultural Decisions) a question was presented as to whom a broker represented. The seller contended that the broker was the agent of the buyer, and the buyer contended that the broker was the agent of the seller. The Secretary held that the broker was the agent of the seller as the seller had agreed to pay the agent's brokerage.

In the case of *Adams etc. v. Martinelli etc.*, 6 A. D. 1018, a question was presented as to whom the broker represented in the transaction. The Secretary held the broker to be the buying agent for the purchaser.

In the case of *Russum v. Schowker etc.*, 6 A. D. 583, a seller of produce filed a proceeding against the purchaser and broker. The broker contended that the purchasers authorized him to order the car of tomatoes for them. In passing on the question of agency, the Secretary referred to the case of *Western etc. v. Krasnow*, P. A. C. A. Docket No. 2312 S-1677, where the following statement is found:

“It has been held repeatedly that where an offer is made by a buyer to a broker who transmits it to the seller, the buyer thereby makes the broker his agent, at least for the purpose of transmitting such offer to the seller and receiving either an acceptance or rejection thereof.”

The Secretary held the respondent Turner to be the broker for the purchaser, and dismissed the proceeding as to the broker.

In 5 A. D. 646 the Secretary stated, "The evidence indicates that the broker's services were paid by the respondent partnership. It is clear that the broker was the agent of the respondent."

In the case of *Barker etc. v. Berman*, 8 Fed. Supp. 60, an action was brought in the United States District Court to enforce a liability determined by the Secretary of Agriculture. With reference to the status of the plaintiff in this proceeding the Court stated as follows:

"Plaintiff was not attempting to sell to the defendant goods which it had acquired for its own purposes. Plaintiff went into the market and made purchases for defendant. Plaintiff was defendant's purchasing agent or broker and was paid a fee for his services in purchasing for the defendant. There was no relationship of buyer and seller despite the fact that the plaintiff advanced the purchase money at the time of obtaining the merchandise."

Under the foregoing authorities the payment by the complainants to Crane of a fee for his services is the determining factor as to whom Crane represented.

The Findings of the District Court Being Supported by Substantial Evidence the Reviewing Court Will Not Consider Conflicting Evidence.

We have heretofore quoted from or summarized the evidence of Mosesman and Bockstein, two of the complainants, also the evidence of the respondents Crane and Kazanjian. All this evidence sustains the findings of the District Court.

The findings of the District Court being sustained by substantial evidence, and we submit they are sustained by the preponderance of evidence, then the reviewing

court will not go into the question of the weight of the evidence or consider conflicting evidence. The rule in this regard is set forth in 3 Am. Jur., page 464, Section 900, as follows:

“When dealing with findings of fact made by the trial court, the question for the appellate court is whether there was any evidence to sustain the conclusion reached by the court below. A finding of fact by the court below cannot be rejected on appeal where there was sufficient evidence to sustain it, where it is not contrary to the preponderance of the evidence, where it cannot be said that there was no warrant for the findings, or where there is room for reasonable minds to differ as to the facts. As the rule is laid down by many courts, findings of the trial court which are supported or sustained by competent evidence are binding upon the appellate court and cannot or will not be interfered with or disturbed by that court, even though the evidence is conflicting.”

In the case of *Bereth v. Sparks* (C. C. A., 7th Cir.), 51 F. 2d 441, 80 A. L. R. 909, appellant sought to have the Circuit Court review the evidence and set aside certain of the findings of the Trial Court. In refusing to do so the Circuit Court stated as follows:

“There was at least substantial evidence adduced and facts found to warrant the court in concluding that appellant was a joint tort-feasor, and with this conclusion we are not at liberty to interfere, if we were so inclined.”

The same rule is supported by the following cases:

Springfield Fire & Marine Insurance Co. v. National Fire Insurance Co. (C. C. A., 8th Cir.), 51 F. 2d 714, 76 A. L. R. 1287;

DeLaval Steam Turbine Co. v. United States, 284
U. S. 61, 76 L. Ed. 168;

Cate v. Certain-Teed Products Corporation, 23
Cal. 2d 444-8, 144 P. 2d 335.

**Complainants Did Not Establish That
Crane Was Agent for Kazanjian.**

On page 24 of appellants' opening brief they state, "The Secretary's finding however, that Crane was a broker acting as agent for both buyer and seller was *prima facie* evidence of such fact, and presumptive thereof until overcome (as distinguished from merely contradicted by) other evidence."

This contention is predicated upon the provisions of the Perishable Agricultural Commodities Act (Sec. 7, subsec. c) which provides that "* * * the findings of fact and order or orders of the Secretary shall be *prima facie* evidence of the facts therein stated."

The preliminary statement, findings of fact, conclusions and order of the Secretary of Agriculture are set forth in the transcript [pp. 41-63]. The Secretary's findings of fact are set forth on pages 49 to 52 and there is no finding that Crane was acting as agent for both buyer and seller.

Under the conclusions the Secretary states: "In this proceeding much discussion was devoted to the question whether Associated was the agent of Red Lion or of complainants." [Tr. p. 52.] The Secretary thereupon points out certain facts developed by the evidence, and presents several statements of law with reference to the question as to whose agent the broker may be, but the Secretary does not make any conclusion holding that

Crane was the agent of both parties. The Secretary then states under his conclusions: "The most important and perhaps the only real issue here is whether a contract was made which is enforceable under the California Statute of Frauds." [Tr. p. 54.]

From the foregoing it will be seen that no *prima facie* case was established by complainants to the effect that Crane was the agent of Kazanjian or the agent of both parties.

Assuming, however, that there is such a finding then we submit that this finding was overcome by a preponderance of evidence. The rule with reference to meeting or overcoming *prima facie* evidence of facts is set forth in 20 Am. Jur. page 1102, Section 1251, as follows:

"When the party having the burden of proof establishes a *prima facie* case, he will prevail, in the absence of proof to the contrary offered on the part of his opponent. If the latter would avoid the effect of such *prima facie* case, he must produce evidence to meet it. It is not necessary that this *prima facie* case be met by a preponderance of the evidence or by evidence of greater weight. It is sufficient if the defendant's evidence equalizes the weight of the plaintiff's evidence, or, in other words, puts the case in equipoise. The burden of maintaining the affirmative of the issue involved in the action is upon the party alleging the fact which constitutes the issue and remains upon him throughout the trial. If upon all the facts the case is left in equipoise, that party must fail."

In the case of *Threlkeld v. Ballard*, 296 Ky. 344, 177 S. W. 2d 157, 151 A. L. R. 708, the Court considered the

question of the effect of the *prima facie* case, and stated the rule as follows:

“It is the settled rule of law that once a party establishes a *prima facie* case, judgment will go in his favor unless the opposite party produces evidence sufficient to overcome the *prima facie* presumption.”

In the case of *First National Bank v. Ford* (Wyo.), 216 Pac. 691, 31 A. L. R. 1441-6, the Court considered the question of the burden of proof and the effect of establishing of a *prima facie* case, and stated the rule as follows:

“He who has the burden of proof, properly speaking, has imposed on him the obligation to establish the existence of the facts alleged by evidence at least sufficient to destroy the equilibrium and overbalance any weight of evidence produced by the other party. (Citing cases.) On the other hand, the burden of evidence, or to go forward with it, means simply the meeting of a *prima facie* case made, rather than producing a preponderance of the evidence, or evidence of greater weight.”

See also *Cody v. Market Street Railway Co.*, 148 Cal. 90; 82 P. 667.

Conclusion.

In conclusion, we submit that the evidence both of the complainants and the respondents shows clearly that Crane was acting as a buying broker and that he was the agent of the buyers; that the findings of the District Court are supported by substantial evidence and assuming, without conceding, that the Secretary's finding established the fact of Crane being the agent for the buyer as well as the seller, such *prima facie* evidence was overcome by competent, substantial evidence presented on behalf of the respondents.

**Answer to Contention That the Undisputed Evidence
Established the Existence of a Binding Contract
Between the Parties Hereto.**

Under Point II of appellant's opening brief appellant sets forth the elements of a contract and certain conclusions drawn by the Trial Court, and then points out that succeeding paragraphs fully demonstrate that the findings and conclusions are unsupported by credible evidence and are erroneous. This contention will be answered under the answer to the succeeding contention.

**Answer to Contention That a Standard Confirmation
of Sale Was Not Necessary.**

Under Points III (page 28), IV (page 35), V (page 36), VI (page 39) and VII (page 40), of appellants' opening brief appellants attack the findings of the Trial Court to the effect that a standard confirmation of sale was contemplated by the parties.

We feel that the District Court was justified in its conclusions of law to the effect "That the telegrams sent by Crane to Margules required that any contract entered into should be confirmed in writing by the parties to the proposed contract and in particular John C. Kazanjian at Exeter, California." [Tr. pp. 81-82.]

The District Court found that prior to September 26, 1944 Crane discussed with Kazanjian the matter of the sale of grapes during the 1944 season; that Kazanjian refused to employ Crane as his broker or agent for the

reason that there was a ceiling price on grapes established under the Federal Emergency Price Control Act, and that the market for grapes at that time was very active, and that Kazanjian did not need a broker or agent to secure customers for the purchase at the ceiling price of the grapes produced and packed by him, and that Kazanjian was willing to sell grapes in car lots but that each sale would be a separate transaction and handled upon terms to be agreed upon at the time of making such sale. [Finding III, Tr. p. 72.]

After discussing the matter of the sale of grapes for the 1944 season Crane being unable to act as the seller's agent or broker sought to develop business by acting as the buying broker or agent for the purchasers, and he thereupon sent out the telegram of Sept. 26, 1944 to thirteen different brokers throughout the United States. This telegram set forth the terms under which Crane could book orders for grapes. This telegram clearly provides that any order would have to be confirmed by both the buyer and the seller. After setting forth certain terms the telegram provides as follows: "\$500 part payment with confirmation" and "ADLAM," which means the grapes were offered subject to confirmation. The terms of this telegram were modified by the October 2nd telegram only in the number of cars and the price. 18 cars were reduced to 15 cars, and the price was reduced from \$2.53 to \$2.50 a lug. Otherwise, the telegram of September 26th stands.

The use of the words "\$500 part payment with confirmation" clearly requires the buyer to send a confirmation to Crane for the signature of the seller, and that this confirmation was to be accompanied by \$500 part payment. The use of the code word ADLAM showed that the offer was made subject to confirmation, which clearly signified a confirmation by the seller. Crane was not the agent of the seller but was seeking employment by buyers as a buyer's agent and as he was sending out these telegrams in an effort to procure buyers, it was necessary that any sale be confirmed by the seller.

It will be remembered that this telegram was sent by Crane to 13 different brokers offering to book 18 cars of grapes. 18 cars were all that Crane mentioned. Assuming that this was an offer to sell, then if each of the 13 brokers had wired Crane accepting the offer Crane would have had orders for 13 times 18 or 234 cars, which would be 216 cars more than Crane had located. This fact clearly demonstrates the wisdom of inserting in the telegram the requirement of the confirmation by the buyer accompanied by his check for \$500 and also confirmation by the seller.

In a teletype message between Crane and Margules on October 2, 1944, "\$500 part payment with confirmation" was changed and the obligation of the buyer was to pay \$1000 deposit against each U. S. One inspection as the cars are loaded. [Tr. p. 475.]

The telegrams and teletype conversations do not disclose any change whatsoever in the requirement that the offer was to be confirmed by the seller. There was competent evidence before the Trial Court to show that under a booking arrangement of this character for future delivery of grapes a written confirmation signed by both parties was contemplated.

Respondent Crane produced in Court a printed standard memorandum of sale which was used by the produce trade in 1944 throughout the United States, and the same was received in evidence as Exhibit L. Crane also produced in evidence a printed form of standard confirmation of sale which was received in evidence as Exhibit M. [Tr. p. 237-8.]

Crane testified that when he sent the telegram of Sept. 26th and Oct. 2nd, and used the words "subject to confirmation" he was referring to a confirmation by the use of the standard confirmation of sale as used by the trade; that he had used that form for years on all pre-season deals where it required a contract in writing; that it was the custom in the produce trade in 1944 to use the standard confirmation of sale and standard memorandum of sale; that he had never received a standard confirmation of sale signed by the complainants or Red Lion. [Tr. pp. 234-8.]

In Crane's telegram of October 3d to Kazanjian he stated: "Will forward forms for your signature soon receive air mail from buyers." [Tr. p. 453.] Crane fur-

ther testified that in sending the telegram of September 26th the grapes were offered subject to confirmation. This was done by the use of the word ADLAM, and in this particular instance this would mean that the sale would have to be confirmed by the seller. [Tr. pp. 195-7.]

Crane further testified that Kazanjian did not agree to his offers to brokers because the offers were made subject to confirmation; in other words you would not make a deal until you got a confirmation in writing by the person who is going to pay, and in the trade, offers were made subject to confirmation, and after a buying broker would receive authority he would get a confirmation from the seller in writing and he would have to secure a written confirmation from the buyer also; that where there is a pre-season deal or future delivery a standard confirmation of sale is always required, according to Crane's experience. That in selling oranges, cherries or grapes for futures, it was the custom of the trade to get a confirmation of sale signed by the parties on both ends who were actually paying the money or delivering the goods; that telegrams were accepted as signed confirmations; that it was the custom in the trade in situations such as existed here to secure a written confirmation of sale from the principals who were the buyers and Crane never received that. [Tr. pp. 213-218.]

Under Crane's evidence and the exhibits offered in support thereof the Court was justified in finding that the dealings between Crane and Margules called for a written confirmation of the sale by both parties.

Answer to Contentions That Neither Kazanjian nor Margules Accepted the Counter-Proposals.

Under Sections VIII and IX of appellants' opening brief they contend that there is no evidence to support the conclusions that Kazanjian never accepted the terms proposed by Margules, and that Margules never accepted the terms proposed by Kazanjian. These contentions referring to dealings between Kazanjian and the complainants are matters which should be properly answered by counsel for Kazanjian.

Counsel for Crane hereby adopts such argument as may be presented by counsel for Kazanjian in his brief in reply to said contentions.

Answer to Contentions That the Statute of Frauds Is Inapplicable.

Under Sections X and XI of appellants' opening brief appellants contend that the Statute of Frauds of California is inapplicable to a proceeding brought under the Perishable Agricultural Commodities Act, and that the California Statute of Frauds only requires the written agreement to be signed by the party to be charged.

We feel that these contentions apply primarily to the defense of Kazanjian and in view of the position of Crane to the effect that he was a buying broker for complainants and as such would not be liable for the default of Kazanjian or would not be liable for the default of Kazanjian even though he was the agent for Kazanjian, in view of the fact that the name of the seller was disclosed, we feel that these contentions should properly be argued by counsel for Kazanjian, and any argument presented by such counsel is hereby adopted as an answer on behalf of respondent Crane.

Answer to Contention That the District Court Erred in Finding That Crane Made No False Representations.

Under Section XII, page 47 of Appellants' Opening Brief, they contend that the District Court's finding that Crane made no false representations is irreconcilable with its conclusion that Kazanjian had not confirmed the sale.

In finding X the District Court found "that the statements and representations made by the said Raymond M. Crane, * * * to the said J. Margules and the Southwest Brokerage Company were not false or fraudulent, and were not made with any intention to defraud said Southwest Brokerage Company or the said Jay Margules or the West Texas Produce Company or the Central Fruit & Vegetable Co." [Tr. p. 81.]

Appellant's objection to this finding is that in finding No. IV, the Court finds that on October 2, 1944, Crane sent a night letter to the Southwest Brokerage Company stating: "Secured RedLyon Packing Company Confirmation Ten Cars Grapes as Outlined * * *" [Tr. p. 75.]

We submit that the Trial Court had before it the witnesses Crane and Kazanjian, and was in a position to determine whether or not the sending of this telegram constituted a violation of 7 U. S. C. A. Section 499(b)(4) so as to afford reparation damages under U. S. C. A. Section 499(f).

Complainants' own evidence showed an oral confirmation by Kazanjian. Complainants offered in evidence a certified copy of the proceedings before the United States Department of Agriculture, which included, among other things, the preliminary statement, findings of fact, conclusions and order of Thomas J. Flavin, Judicial Officer, date April 23, 1948. [Tr. pp. 125-126.]

One of Mr. Flavin's findings was to the effect that "On or about October 2, 1944, Red Lion orally authorized Associated to confirm the sale of 10 of the 15 carloads to complainants * * *" [Tr. pp. 49-50.]

In addition to this finding, as disclosed by complainants' own evidence, the District Court had before it the evidence of Raymond M. Crane and John C. Kazanjian.

Crane testified [Tr. p. 189] on cross-examination by Mr. Hoppenstein [Tr. p. 205], that he signed and sent the wire of October 2, 1944, to Southwest Brokerage Company, stating "secured RedLyon Packing Company confirmation ten cars grapes as outlined * * *" that he had secured from Mr. Kazanjian as the basis of sending that wire the statement that if we could meet the terms demanded he would sell these grapes under the terms that we had outlined in our telegrams from previous communications. That he, Crane, outlined to Kazanjian the terms under which he offered these grapes and had received an offer back from Southwest Brokerage. This was on the telephone and Crane thereupon went on to outline the conversation with Kazanjian. [Tr. pp. 209-210.]

The witness Crane further testified that at the time he sent the telegram of October 2nd quoting revised deal, he had discussed the terms of it with Mr. Kazanjian and that the offer was subject to confirmation and that you don't make a deal until you get a confirmation, until it is finished. [Tr. p. 213.] That in the produce business the use of the words "subject to confirmation" means confirmation in writing, by the person who is going to pay for it, that is what is finally understood and in our business, telegrams are considered writing. [Tr. pp. 214-215.] The sale subject to confirmation would require

a confirmation from the person who is going to sell the merchandise. [Tr. p. 215.] It is customary in the trade to accept telegrams as confirmation of sale except where they are required to secure a signed confirmation. And in connection with this transaction it was the custom of the trade to secure a written confirmation from the shipper Red Lion. [Tr. p. 217.] It was the custom of the trade in situations such as this, to secure a written confirmation of sale from the buyers and he never did receive it, and at the time he sent the telegram of October 2, 1944 stating "Secured RedLyon Packing Company confirmation" he did not have Red Lions' signature on a confirmation. He had their verbal agreement over the telephone. The custom of the trade is you get a deal, you call the shipper, you buy or sell whatever you are doing and if they agree to what you have done, they say yes, or no. In this particular instance I thought I secured an entire agreement as to what we proposed and what we had been proposing. A confirmation of sale and signature is a different subject. I hadn't received a written confirmation of sale but I wired Southwest Brokerage I had received confirmation of the deal because Southwest Brokerage was to get a confirmation signed by the buyer and send it to us and we would get it signed by the shipper and then send a copy back and retain a copy. [Tr. pp. 218-219.]

The witness Crane further testified that in this particular instance we fully expected to received a signed confirmation of sale which we requested from the broker. The broker normally makes it out and forwards it to us when he requests it and then we take and deliver it to the seller and get him to sign it. I think we requested that of

Southwest Brokerage in the original transaction. [Tr. p. 248.]

The foregoing testimony of witness Crane, including the complainants' own evidence shows clearly the Court was justified in finding that the statements and representations of Crane were not false and fraudulent and were not made with any intention to defraud the Southwest Brokerage Company or Margules or West Texas.

There Was No Misrepresentation or Failure to Perform a Duty Sufficient to Justify a Recovery Against Crane.

The foregoing quoted or summarized evidence and the telegrams and teletypes hereinbefore referred to and set forth in the appendix to Appellants' Opening Brief show that (1) during the ceiling on grapes Kazanjian would not employ a broker; (2) Crane, as agent for purchasers was trying to book orders for the sale of grapes; (3) Crane was to be paid a procurement charge by the buyer; (4) the offer to book grapes was subject to confirmation. [Tr. p. 451.] This meant signed confirmation by both parties.

Margules attempted to close a deal for 10 cars by a teletype message to Crane but Crane replied by teletype "Haven't been able to contact the shipper yet but sure it's okay. Will wire you definitely one way or other soon as get him." [Tr. pp. 475-476.]

By night letter on October 2, Crane wired Margules "Secured RedLyon Packing Company confirmation ten cars grapes as outlined * * *" [Tr. p. 75.]

By teletype on October 3rd Crane asked Margules "Did you sell entire ten cars Emperors" [Tr. p. 474]

and Margules replied by teletype, "What are U talking about? We ordered and you already confirmed by wire 10 cars Emperors advise." [Tr. p. 475.]

The provision of the September 26th telegram that the offer to book grapes was subject to confirmation shows clearly that Kazanjian must confirm and from Crane's evidence it meant both parties must confirm and the confirmation must be in writing and signed by seller and buyer. This is borne out by Crane's telegram to Kazanjian on October 3rd (referring to October 2 telephone conversation, between Crane and Kazanjian, where Kazanjian orally confirmed ten cars) wherein he stated "will forward confirmation for your signature soon receive air mail from buyers." [Tr. p. 476.]

Clearly there was no misrepresentation to Margules by Crane. Margules should have known the customs of the trade with reference to signed confirmations by both parties where a buying broker is trying to negotiate a sale for future delivery. Margules sending a Standard Memorandum of Sale in place of a Standard Confirmation of Sale (as required by September 26 telegram) imposed no duty on Crane in view of Kazanjian's telegram to Crane on October 4th injecting new terms into the deal. Crane thereupon sent Mr. Hoover to Kazanjian's packing house to iron out the deal and when the ceiling was lifted a few days later Kazanjian claimed he was not bound to go on with the proposed deal.

The District Court was justified in holding that there was no misleading statement made for a fraudulent purpose, which would be necessary under 7 U. S. C. A. Sections 499(b)(4) and 499(f).

Complainants Are Not Entitled to Recover on the Grounds of Fraud, as It Was Not at Issue Before the Department or the District Court.

Under Point XII appellants object to the finding that Crane made no false representations, and then contend that there were false representations and that under the Perishable Agricultural Commodities Act complainants were entitled to damages against Crane for fraudulent statements.

It will be remembered that the complaint in this action was one wherein complainants alleged that on October 3, 1944, in the course of interstate commerce respondents, by a contract in writing, contracted to sell to complainants ten carloads of grapes [Tr. p. 17, par. 4]; that Margules acted for both complainants and respondents and Associated acted for and on behalf of itself and as agent for Red Lion. [Tr. p. 19, par. 5.]

Nowhere in the complaint before the Department, or in any amended complaint, did complainants seek to recover against Crane on the theory of fraud and misrepresentation.

One of the fundamental rules of an action to recover for fraud or misrepresentation is that a fraud must be alleged. The rule in this regard is set forth in 12 Cal. Jur. p. 800, Section 62, as follows:

“Fraud is never presumed. Whenever fraud constitutes an element of a cause of action or defense which is of an affirmative nature the facts must be alleged. One against whom charges of fraud are

made is entitled to specific averments of the acts of which he is accused, so that he may admit or deny them, and thus present real issues. This is the rule whether the fraud relied on is actual or constructive. It is not, therefore, sufficient to alleged fraud in general terms; such allegations are merely of conclusions which the pleader is not permitted to draw and which present no issuable facts.”

In the case of *Vandervort v. Farmers and Merchants National Bank, etc.*, 7 Cal. 2d 28-30; 59 P. 2d 1028; the Court stated the rule as follows:

“Whenever fraud constitutes an element of a cause of action the facts must be alleged. (12 Cal. Jur. 800.) There must be an allegation among others that the false representations were made with intent to deceive the plaintiff or with intent to induce her to enter into the transaction. (12 Cal. Jur. 808, Sec. 65, and cases cited.) There is no allegation in the complaint either of intent upon the part of the defendant to deceive the plaintiff or of an intent to induce plaintiff to act in the matter, and there are no allegations of facts and circumstances from which such intent must necessarily be implied. Indeed, there are no allegations of false representations made by the bank. There are allegations that the plaintiff did not know certain facts connected with the transaction and that the bank did know said facts and failed to inform the plaintiff, but there is no allegation that the bank knew that plaintiff did not know, and there is no allegation directly or indirectly that it was the duty of the bank to inform the plaintiff

of matters contained in her own agreements of which she and her confidential agent presumptively had full knowledge.”

In the case of *Carpenter v. Smallpage*, 220 Cal. 129; 29 Pac. 2d 841; the Court considered an action to quiet title and in the course of the trial the plaintiff offered evidence in support of the claim of fraud in procuring a deed of trust under which the defendants claimed. The Trial Court refused to admit the evidence and on appeal, in affirming the judgment the Supreme Court stated:

“The ruling of the court was correct, as plaintiff failed to charge fraud in his complaint or in any of his pleadings.” (Citing cases.)

Crane Would Not Be Liable for the Failure of Kazanjian to Ship.

As heretofore pointed out, Crane's contention before the Department was that he was the agent of the buyer and as such would not be liable for the failure of the seller to ship.

Crane never owned or possessed the 18 cars of grapes, the title and possession thereof being in Kazanjian.

Assuming that there was a binding contract on the part of Kazanjian to ship, Crane could not force Kazanjian to go through with the contract.

It seems unnecessary to present authorities in support of the contention that Crane being the agent of the buyer would not be liable for the default of the seller.

Assuming, but Not Conceding, Crane to Be the Agent of Kazanjian, He Still Would Not Be Liable for Kazanjian's Default.

This contention is urged wholly upon the assumption, without conceding the same to be correct, that Crane was the agent of Kazanjian. Still Crane would not be liable for Kazanjian's default because he had disclosed to the complainants the fact that he was acting as an agent or broker and the name of the principal for whom he was acting.

Crane's telegram to Southwest Brokerage Company under date of October 2nd disclosed Red Lion Packing Company as the shipper of the grapes.

Joe Mosesman, one of the complainants, testified as follows:

"I knew Crane was trying to get some grapes for me and on the morning of October 3rd I knew that Crane was trying to get ten cars of Emperor grapes for me from Red Lion Packing Company and it was satisfactory to me for him to try and get the grapes for me." [Tr. pp. 395-6.]

The rule regarding non-liability of the broker is set forth in 8 Am. Jur., 1059, Section 129, as follows:

"In accordance with the general rule of the law of agency, so long as a broker discloses his principal, or the party with whom he is dealing knows that he is acting for an undisclosed principal, he cannot be held personally liable upon a contract he negotiates on the latter's behalf, unless he employs terms which in legal effect charge himself, or personally guarantees or warrants a matter."

In the case of *Walker v. Cross* (C. C. A. 8th Circuit) 160 Fed. 372, Cross sued Walker Bros. to recover damages for the alleged breach of a contract for the sale of real estate. Walker Bros. were real estate brokers having their place or business at Macon, Missouri, and handled the matter of the sale to one Cross for a non-resident owner of certain real property in the State of Missouri. After some negotiations an agreement for the sale of real property was prepared in which Walker Bros. was named as the seller. The agreement was never signed by either of the parties. The negotiations proceeded between the parties and Walker Bros., at all times disclosed that they were not the owners of the property but were merely acting as agents for the seller. The transaction was finally consummated and Walker Bros. received their commission of \$320.00 and one Nailen, the purported owner of the property, received the balance of the purchase price after paying liens and expenses of sale. It later developed that Nailen did not own the property and Cross sued Walker Bros. for damages for failure of title. The Court held that Walker Bros., as agents for the seller, were not liable for loss on the theory that the seller's agent is not liable for a default on the part of the seller.

In the case of *Mallory Steamship Co. v. Garfield* (C. C. A. 2d Circuit), 10 Fed. (2d) 664, the original plaintiff in the action sought to recover damages for delay in transportation of cotton from Texas to Rhode Island. The Mallory Steamship Co. was acting as agent for the United States Shipping Board Emergency Fleet Corp. The original plaintiff in the action was aware of the relationship between the Fleet Corp. and Mallory, for he pleaded the relationship of that agency in the complaint.

In holding that the Mallory Steamship Co. was not liable, the Court stated:

“An authorized agent is not liable for breach of a contract which it makes on behalf of the principal except where the agency is concealed, or where it is contracting as ostensible principal. (Citing cases.)

* * *

“The record shows that the plaintiff in error did in fact both actually and ostensibly act as agent, and not as principal. Since it acted within the scope of its apparent authority in entering into a contract of carriage, the contract is that of the principal, the Fleet Corporation. All the rights and obligations which arise under it are those of the Fleet Corporation, and the agent cannot enforce the contract, neither is he bound by it.”

In the case of *Marks v. Rucker & Co.*, 53 Cal. App. 568, 200 P. 655, plaintiff sought to recover a deposit made on account of the purchase price of an apartment house. The defendant acted as agent for the seller and the fact of agency as well as the owner's name was disclosed. In denying recovery of the deposit from the agent the Court stated:

“It therefore appears that plaintiff's assignors were informed by the agent of the names of its principals. But even though we were to assume that the names of the principals were not actually disclosed to the purchasers by the agent, nevertheless it is apparent from the record that the identity of such principals was known to the purchasers from Mrs. Merrill's previous visit to the owner of the apartment house, and that they contracted with the defendant merely as an agent.

“To relieve the agent of liability, it is sufficient that the other contracting party have actual knowledge of the identity of the principal; it is immaterial how such knowledge was acquired. * * *

“Under such circumstances, it is apparent that the remedy is against the principal and not against the agent.”

The same rule is laid down in the following cases:

Hurricane Milling Co. v. Steel & Payne Co.
(W. Va.), 99 S. E. 490; 6 A. L. R. 637;

Drake v. Pope, 78 Ark. 327; 95 S. W. 774;

Hoon v. Hyman, 87 W. Va. 659; 105 S. E. 925;

King v. Russell, 278 Mich. 529; 270 N. W. 775.

Conclusion.

In conclusion we submit that the findings of the Trial Court are supported by substantial evidence; that Crane was a buying broker and agent for the buyers and as such would not be liable for the default of the seller.

The judgment of the Trial Court should be affirmed.

Respectfully submitted,

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California.*

No. 12,884

IN THE

United States Court of Appeals
For the Ninth Circuit

CENTRAL FRUIT & VEGETABLE Co., and
WEST TEXAS PRODUCE COMPANY,

Appellants,

vs.

ASSOCIATED FRUIT DISTRIBUTORS OF
CALIFORNIA, RAYMOND M. CRANE,
RED LION PACKING COMPANY and
JOHN C. KAZANJIAN,

Appellees.

BRIEF OF APPELLEE JOHN C. KAZANJIAN,
DOING BUSINESS AS RED LION PACKING COMPANY.

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JOHN C. KAZANJIAN,
Appellees.

**BRIEF OF APPELLEE JOHN C. KAZANJIAN,
DOING BUSINESS AS RED LION PACKING COMPANY.**

JURISDICTIONAL STATEMENT.

This action originated before the Secretary of Agriculture under the provisions of the Perishable Agricultural Commodities Act (7 U.S.C.A. 499), when appellants, Central Fruit & Vegetable Co. (hereinafter referred to as "Central Fruit"), and West Texas Produce Company (hereinafter referred to as "West Texas Produce"), filed a complaint against appellees, Raymond W. Crane, doing business as

Associated Fruit Distributors of California (hereinafter referred to as "Crane"), and John C. Kazanjian, doing business as Red Lion Packing Company (hereinafter referred to as "Kazanjian"). The Secretary of Agriculture is given jurisdiction to determine the matters presented to him by the provisions of 7 U.S.C.A., Section 499(f) and (g).

Appellees filed answers to the complaint and a formal hearing was had in Los Angeles, California, before an examiner appointed by the Secretary of Agriculture.

The report of the examiner who presided at the formal hearing dismissed the complaint as to Kazanjian but awarded damages against Crane. However, after the hearing the Secretary of Agriculture made an award in favor of Central Fruit against Kazanjian in the amount of \$6,133.26 and in favor of West Texas Produce against Kazanjian in the sum of \$10,112.16, together with interest (Tr. p. 63), and dismissed the complaint against Crane.

Kazanjian appealed to the United States District Court for the Southern District of California. The jurisdiction of the United States District Court to hear and determine the appeal from the order of the Secretary of Agriculture is based upon the provisions of law contained in 7 U.S.C.A., Section 499(g). Crane filed an amended answer.

The United States District Court conducted an extended trial *de novo* and made and entered its judg-

ment dismissing the action against both Kazanjian and Crane (Tr. p. 84, et seq.).

Appellants made a motion for a new trial (Tr. p. 88, et seq.), which was denied by the United States District Court (Tr. p. 108).

Appellants Central Fruit and West Texas Produce then filed this appeal to the United States Court of Appeals, which is given jurisdiction to review the judgment of the United States District Court by the provisions of law set forth in Section 128 of the Judicial Code, 28 U.S.C.A., Section 1291.

ARGUMENT.

I. APPELLANTS' ARGUMENT OVERLOOKS ELEMENTARY POINTS OF LAW.

Throughout their opening brief appellants make arguments which ignore elementary rules of law, i.e., the effect of the findings of fact of the Secretary of Agriculture and of the findings of the District Court after the trial *de novo*. To eliminate a reconsideration of these points in answer to each of appellants' contentions, they will be reviewed briefly without reference to any of appellants' particular contentions.

In addition, appellants in their arguments constantly assume facts which have been found by the District Court not to exist. For example, the District Court found that Kazanjian never entered into a binding agreement to sell grapes to appellants. In

spite of this finding which was amply supported by the evidence, appellants assume throughout their brief that such a contract existed. As the major premise upon which their argument is based is false, their argument must fail and the authorities cited in support thereof are in many instances irrelevant to the real issues.

A. APPELLANTS MISCONSTRUE PROVISION IN SECTION 499g (c) OF PERISHABLE AGRICULTURAL COMMODITIES ACT, 7 U.S.C.A. 499g (c), THAT FINDINGS OF FACT OF SECRETARY OF AGRICULTURE SHALL BE PRIMA FACIE EVIDENCE OF FACTS STATED THEREIN.

Section 499g(c) of the Perishable Agricultural Commodities Act, 7 U.S.C.A. 499g(c), provides that on an appeal from a reparation order by the Secretary of Agriculture to the District Court of the United States, such suit in the District Court shall be a trial *de novo* and shall proceed in all respects like other civil suits for damages, except that the findings of fact and order or orders of the Secretary shall be *prima facie* evidence of the facts stated therein. Appellants' opening brief misconstrues the intent and meaning of this provision and overlooks the fact that any *prima facie* effect of the Secretary's findings and orders has been overcome by contradictory evidence which was accepted by the District Court. Even the cases cited by appellants regarding the *prima facie* effect of the Secretary's findings and orders state that the facts found by the Secretary shall stand *only* until sufficient evidence is produced on the trial to overcome them. The trial *de novo* under this section means a

trial anew of the entire controversy, including the hearing of evidence as though no previous action had been taken.

Spano v. Western Fruit Growers, Inc., 83 F. 2d 150 (CCA 10).

B. AFTER A TRIAL DE NOVO IN THE DISTRICT COURT THE FINDINGS OF THE DISTRICT COURT MUST BE SUSTAINED UNLESS CLEARLY ERRONEOUS.

Throughout their brief appellants ignore the evidence before the District Court which was considered by it in making its findings and proceed upon the basis that this Court will overlook entirely the evidence upon which the District Court based its findings and enter findings contrary thereto without a showing that the District Court's findings are clearly erroneous.

Normally, a trial Court's findings on conflicting testimony in open Court will not be disturbed on appeal.

Clements v. Coppin, 61 F. 2d 552 (CCA 9).

As provided in Rule 52 of the Federal Rules of Civil Procedure (28 U.S.C.A.), findings of fact of a trial Court shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial Court to judge the credibility of the witnesses.

United States v. Fotopulos, 180 F. 2d 631 (CCA 9).

In the present case, extended oral testimony was presented by the parties involved. The trial Court had the opportunity of observing the witnesses and the

demeanor of these witnesses and their sincerity and their candor is a matter for the trial tribunal.

The District Court is not bound by the findings of the Secretary but makes its findings based upon the evidence before it. As was stated in *A. E. Barker & Co. of California v. Gilinski Fruit Company*, 100 F. 2d 863 (CCA 8), on page 864:

“It was the conclusion of the Secretary of Agriculture upon the evidence before him that the buyer had not found the melons below requirements on inspection admittedly made at the time of tender, and had not given notice of rejection within the time required, but the conclusion of the District Court upon the evidence before it was to the contrary as appears from its carefully considered opinion included in the record. It is earnestly contended here that the District Court was in error, and especially that it failed to accord proper weight to the evidence tending to show that the buyer did not give the required notice of rejection within the twenty-four hour period. But the state of the record here does not permit this court to pass upon the issues of fact in controversy. The trial in the District Court was *de novo*, as required by the statute (Section 499g(c)), and the questions of fact having been submitted upon conflicting evidence to the court sitting without a jury, the general finding of the court was as conclusive as a verdict tendered by a jury. *Fleishmann Construction Corp. v. United States*, 270 U.S. 349, 46 S. Ct. 284, 70 L. Ed. 624; *Central of Georgia Ry. v. West Virginia Pulp and Paper Co.*, 67 App. D. C. 309, 92 F. 2d 292.”

In the present case the District Court properly conducted the trial *de novo* at which extensive oral and written testimony and evidence was received and the findings of the District Court supplant those of the Secretary and are as conclusive as if the Secretary had never made findings.

Ashton v. Sentney, 145 F. 2d 719 (CCA 9);

Larsen v. Portland California S.S. Co., 66 F. 2d 326 (CCA 9);

Gates v. General Casualty Company of America, 120 F. 2d 925 (CCA 9).

The appellants throughout fail to sustain the burden of presenting a proper record which would compel the overthrowing of the findings below because the evidence contained in the record shows a direct conflict which has been determined adversely to the appellants by the District Court.

United States v. Foster, 123 F. 2d 32.

II. CRANE WAS THE AGENT OF APPELLANTS AND NOT OF KAZANJIAN.

Appellants attack the findings of the District Court that Crane was their buying broker and agent (Tr. p. 78, par. VII), but was not the broker or agent of Kazanjian (Tr. pp. 71-72, par. III).

In making this attack appellants again overlook the rule that after a trial *de novo* the findings of fact of the District Court will be sustained unless clearly erroneous (see authorities cited *supra*). Appellants

rely upon the *prima facie* effect of the Secretary of Agriculture's conclusion, not finding, that Crane was an agent of Kazanjian as well as of appellants. There is no real contention that there was not ample evidence adduced in the District Court to sustain its findings.

Appellants concede that Kazanjian was not to pay Crane any compensation because, as found by the District Court, the market was a seller's market during which Kazanjian could sell his grapes at the ceiling price established under the Federal Emergency Price Control Act without employing or paying a broker or agent (Tr. p. 72, par. III). Appellants' testimony showed that they were to pay Crane \$50.00 per car to buy grapes for them.

Joe Moseman, one of the partners of Central Fruit, admitted that he was willing to pay Crane \$50.00 per car for purchasing grapes for Central Fruit as well as 3% brokerage to Southwest Brokerage Company (Tr. p. 392, and Tr. p. 418), and that Crane was trying to get some grapes for him (Tr. pp. 395-396). Contrary to the complaint verified by him which stated that Crane acted in behalf of himself and as the agent of Kazanjian, Mr. Moseman admitted that Crane was the agent of appellants when he testified:

“Q. You of course regarded Mr. Crane, that is, The Associated Fruit Distributors, as acting for you and as your employee in procuring this fruit for you, didn't you?

A. Well, yes.

Q. And he and the Southwest Brokerage Company were both acting for you in trying to procure grapes, were they not?

A. That's right." (Tr. p. 410.)

He stated that he considered Crane to be his agent (Tr. p. 419).

Harry Bockstein, one of the partners of West Texas Produce, admitted that it was to pay Crane \$50.00 per car for buying brokerage (Tr. p. 148), on cars bought for West Texas Produce.

Certainly, appellants cannot contend that the District Court's findings that Crane was their agent is unsupported in view of their own testimony. In addition, Crane testified that he was acting as a buying agent for appellants (Tr. pp. 203-204); that his charge of \$50.00 per car was intended as compensation for acting as agent for the appellants (Tr. p. 303); and that the only way a broker could exist at that time was to act for the buyer because ceiling prices were set (Tr. p. 307).

It will be recalled that the District Court found that Kazanjian could sell his grapes at the ceiling price without employing or paying a broker or agent (Tr. p. 72, par. III). Obviously, there was ample reason for appellants employing Crane as an agent and absolutely no reason for Kazanjian to do so.

Crane testified that he had no agreement with Kazanjian during the period of ceiling prices for the payment of commissions to him (Tr. p. 239). Had

he been acting as the agent of Kazanjian he would have required compensation.

Kazanjian's testimony clearly shows that Crane was not employed by him and was not acting as his agent. Appellants impliedly concede that Kazanjian's testimony could be accepted by the District Court as supporting its finding that Crane was not Kazanjian's agent so that it need not be quoted in detail.

Kazanjian testified that he did not know what Crane was doing, that was Crane's business (Tr. p. 338); that Crane had no authority, either oral or written, from Kazanjian to make any offer on Kazanjian's behalf (Tr. p. 338); that he had not given Crane any authority to make any definite offers (Tr. p. 338); that Crane was supposed to come to Kazanjian with a proposition and see if it was satisfactory to Kazanjian (Tr. p. 338); that Crane was to make the deal and then come to Kazanjian and find out if the deal was satisfactory to Kazanjian; that he never told Crane what deal to offer (Tr. p. 339); that he never authorized Crane in writing to sell grapes to appellants (Tr. pp. 186-187); that he did not know Crane had sent the September 26, 1944 telegram to appellants (Tr. p. 181); that Crane never told him with whom Crane was dealing or doing business (Tr. pp. 185 and 340); that he had absolutely no control or direction over what Crane did or acted or negotiated (Tr. p. 359); and that there was no agreement on his part in this deal to pay any commission to Crane (Tr. p. 360).

It is clear that the elements necessary to constitute Crane the agent of Kazanjian are missing if the testimony of Kazanjian is accepted. The findings of the District Court show that the Court found that Kazanjian was a credible witness i.e. as defined by Words and Phrases under the topic "Credible Witness", to wit:

"A credible witness is merely one who is competent and trustworthy and worthy of belief."

See also 15 *Corpus Juris* 1347 for definition.

As pointed out by Rule 52 of the Federal Rules of Civil Procedure (28 U.S.C.A.) and authorities hereinbefore cited, due regard must be given to the opportunity of the trial Court to judge the credibility of witnesses. Here the trial Court adjudged the testimony of witnesses and found more credible those testifying to facts showing that Crane was not an agent of Kazanjian.

Appellants attempt to set forth in their brief certain arguments contrary to the Court's findings but all are based upon the false presumption of an agreement that Crane could speak for Kazanjian. The Court has found that no such agreement existed and appellants have not sustained the burden of showing why the Court's findings should be overthrown.

Appellants cite cases pertaining to the findings of the Secretary of Agriculture and their effects *until* sufficient evidence is produced at the trial to overcome them. As pointed out hereinbefore and in *Spano v. Western Fruit Growers, Inc.*, 83 F. 2d 150, and *A. E.*

Barker & Co. v. Gilinski Fruit Company, 100 F. 2d 863, where the matter is tried *de novo* and the matter is submitted upon conflicting evidence, the findings of the District Court overcome the prima facie effect of the secretary's findings and become as conclusive as a verdict of a jury or a finding of the Court without any findings of the secretary.

Rhode v. Bartholomew, 94 Cal. App. 2d 272, *Vahlsing v. Rothstein*, 107 Pa. Supp. 281, 163 Atl. 350, and 12 *Corpus Juris Secundum* 8, are cited by appellants as authority that a broker may act as agent for either or both parties. Why they are cited is uncertain. Kazanjian did not know of the dealings between Crane and appellants (Tr. pp. 181, 185 and 340); Kazanjian did not carry on any negotiations with appellants or either of them as Crane was neither his agent or intermediary; Kazanjian was not to pay Crane; and Kazanjian never entered into a contract to sell grapes to appellants. The District Court's finding that Crane was not the agent or broker of Kazanjian makes the cases so cited inapplicable.

III. NO BINDING CONTRACT BETWEEN KAZANJIAN AND APPELLANTS EVER EXISTED.

The District Court found that neither Kazanjian nor Crane entered into any written agreement for the sale of grapes to appellants (Tr. p. 79, par. IX); that Kazanjian never authorized Crane in writing to sell grapes for him and that Kazanjian never ratified in writing any proposed sale (Tr. p. 80, par. IX); and

that the parties never at any time agreed upon the terms of a contract of sale of grapes and that there was no meeting of the minds of the parties as to the terms of the proposed sale (Tr. p. 81, par. X).

If these findings are supported by evidence all other points in this case become immaterial. If there was not any meeting of the minds of the parties as to the terms of the proposed sale, there was not any contract and not any basis for a complaint exists. These findings of the Court are so amply supported by oral and documented evidence that no other conclusion could be reached.

As found by the District Court and as pointed out hereinbefore, Kazanjian was not represented by Crane and did not know what Crane was doing or with whom he was dealing. The only written documents or messages which came to or were sent by Kazanjian were Crane's telegrams to him of October 3, 1944, and Kazanjian's answering telegram to Crane of October 4, 1944. These telegrams are the only basis possible for claiming a contract upon the part of Kazanjian. An examination shows that not any contract was entered into by the telegrams but that Crane by his October 3rd telegram made an offer which was rejected by Kazanjian's October 4th wire which in turn submitted new counter proposals which even appellants do not seriously contend were accepted.

Crane's wire of October 3, 1944, from Los Angeles, California, to Kazanjian at Exeter, California, read as follows:

"RED LYON PACKING CO.
EXETER, CALIFORNIA

REFERRING TELEPHONE HAVE SOLD FOR YOUR ACCOUNT
BASIS 2.50 LUG NET TO YOU BLOCK EMPERORS MENTIONED
FIVE CARS BASIS 750.00 CARE DEPOSIT TEN CARS BASIS
1000.00 DEPOSIT TO BE PAID UPON RECEIPT USONE GOV-
ERNMENT INSPECTIONS NOW DEPENDING YOU HANDLE
THROUGH US BALANCE CARS YOU MENTIONED FOR FRESH
SHIPMENT ADVISE WHEN EXPECT SHIP THESE BELIEVE
WE COULD PLACE THEM NOW CEILING PRICDXXX PRICE
WITH DEPOSITS SELLING BASIS ABILITY MAKE USONE
GRADE SUGGEST GIVE US APPROXIMATE SHIPPING DATES
MAYS WELL GET CLEANEDUP SINCE CEILING PRECLUDES
ANY POSSIBILITY HIGHER MARKET TIME OF SHIPMENT
WILL FORWARD CONFIRMATION FOR YOUR SIGNATURE
SOONS RECEIVED AIRMAIL FROM BUYERS.

ASSOCIATES FRUIT DISTRIBUTORS OF CALIF."

(Tr. p. 453) (Underscoring is by appellee).

Kazanjian rejected the offer in Crane's telegram and made new counter offers in his October 4, 1944, telegram which read as follows:

"ASSOCIATED FRUIT DISTRIBUTORS

FIFTEEN CARS STORAGE U. S. ONE EMPERORS DECEMBER
TENTH CONVERSION SATISFACTORY AT TWO DOLLARS AND
FIFTY CENTS FOB EXETER GUARANTY BY BUYER. ONE
THOUSAND DOLLARS DEPOSIT ON 10 CAR\$ AND SEVEN
HUNDRED FIFTY DOLLARS ON FIVE CARS SAID DEPOSIT
TO BE PAID IMMEDIATELY ON INSPECTION AT SHIPPING
POINT. YOU TO ARRANGE FOR STORAGE AS AGREED. BAL-
ANCE OF PACK INTEND TO LOAD AFTER OCT. TWENTIETH
WILL BE GLAD TO MAKE DEAL ON SAME ABOUT THE 15TH
OF OCT.

JOHN C. KAZANJIAN

150 PM

US FOB 10:15 KAZANJIAN"

(Tr. p. 454) (Underscoring is by appellee.)

Even a casual comparison of the two telegrams shows the rejection of the offer contained in the first telegram and new counter offers.

Crane's telegram provided that the deposit of \$1,000.00 per car for ten cars and \$750.00 per car for the first five cars was to be made "upon receipt USONE government inspections", which could only mean upon receipt of the government inspections by appellants in Texas. Mr. Bockstein, one of the partners of West Texas Produce Co., so testified (Tr. pp. 165-166). Kazanjian's telegram rejected this proposal and required that upon all fifteen cars "deposit to be paid immediately on inspection at shipping point". The shipping point was Exeter, California, not some place in Texas. This difference is apparent, Kazanjian wanted his deposit i.e. cash, in Exeter, California, immediately upon inspection. He did not want to mail an inspection to Texas and receive in exchange a check or draft which in turn would be payable in Texas. Crane testified that on all grapes purchased from Kazanjian during the period of ceiling prices immediate cash deposit was made (Tr. p. 241). The so-called Memorandum of Sale which appellants' broker Margules forwarded to Crane (Tr. pp. 26-27) actually specified that appellants would pay by drafts through specified Texas banks upon receipt of the inspection reports. Incidentally, no copy of this was forwarded to Kazanjian.

Crane's telegram provided "depending you handle through us balance of cars you mentioned for fresh shipment advise when expect ship these", i.e., he was

making a term of the offer the handling of the balance of Kazanjian's shipment. Kazanjian rejected this term by stating "balance of pack intended to load after October Twentieth will be glad to make deal on same about 15th of October."

Appellants by their pleadings and testimony claim to have purchased ten cars, yet the two telegrams refer to fifteen cars.

Under cross-examination by Mr. Hoppenstein, one of the attorneys for appellants, Kazanjian testified that he told Crane that "I wanted my payment in Exeter" because a tomato shipper next door to him went broke because the parties to whom the tomatoes were sold owed money when he got through (shipping) and "I wanted to be sure that I had my money right there in Exeter at the time while I still have physical possession of my grapes" (Tr. pp. 179-180). He further testified that Crane would give him the storage space if Kazanjian would tie in all the rest of his grapes and give them to Crane but that Kazanjian didn't want to commit himself to do so at the time (Tr. p. 180). Kazanjian testified that one other condition was that the inspections were to be taken in Exeter, at the place of packing, not out of storage or any other place (Tr. pp. 180-181), and that when he got Crane's wire not one of these three major things was clear and not one of the terms was satisfactory (Tr. p. 181).

There was not any acceptance of Crane's offer by Kazanjian. It was rejected and new terms proposed. These latter were never accepted.

Crane's wire provided "will forward confirmations for your signature soon received airmail from buyers". This added a contingent term which was never complied with even if Kazanjian had accepted Crane's offer instead of rejecting it. Crane never received the confirmation referred to from the buyers and never forwarded any confirmation to Kazanjian (Tr. p. 240).

IV. THE DISTRICT COURT CORRECTLY FOUND THAT CRANE INTENDED TO DESIGNATE A STANDARD CONFIRMATION FORM.

Appellants argue (Points III, IV, V, VI and VII of their Opening Brief) that the District Court's finding that Crane intended to designate the use of a standard confirmation form before a binding agreement was entered is against the weight of credible evidence. This argument again overlooks the fact that the District Court observed the various witnesses and under Rule 52 the Federal Rules of Civil Procedure and the authorities hereinbefore cited must be deemed to have adjudged those witnesses and evidence in support of its finding more credible than the witnesses and evidence against it.

As the points raised are actually immaterial because there was not any contract entered into by Kazanjian and to avoid repetition, only brief comment will be made upon these points and the argument of Crane upon these points is adopted by Kazanjian.

Appellants argue that there was no ambiguity in Crane's telegram of September 26, 1944 (Tr. pp. 26-

27). Appellants' discussion and efforts to explain the telegram indicate the presence of an ambiguity. However, even assuming this to be true, it is immaterial insofar as Kazanjian is concerned. He did not authorize Crane to send any telegram and did not know it was sent (R.T. p. 181). Naturally he is not bound by it. Kazanjian had not authorized Crane to make a sale for him. Appellants falsely assume that Crane could confirm a sale or enter into a contract for Kazanjian which Kazanjian had not authorized.

Appellants argue that the Court erred in permitting Crane to testify that the phrase "Subject to Confirmation" in his telegram of September 26, 1944, constituted a reference to confirmation by use of a particular form. The telegram went to thirteen different brokers and specifically provided that the offer was subject to confirmation. The Court admitted the testimony upon the ground it goes to the custom of the trade. While immaterial to Kazanjian for the reasons set forth, it appears that appellants' argument that there was no ambiguity in the telegram must fall because without the oral testimony it cannot be ascertained what the phrase meant or from whom the confirmation was to come i.e., the buyer, the seller, or both. However, as the Court found that Kazanjian was not a party to any contract, the introduction of this evidence would be immaterial or would not constitute reversible error.

Cascaden v. Bell, 257 F. 926, 930 (CCA 9);

Anglo California Nat. Bank v. Lazard, 106 F. 2d 693, 706 (CCA 9).

Appellants argue that even if Crane's telegram required the use of a standard confirmation of sale, as found by the Court (Tr. p. 77, par. V), his intention was undisclosed or would not bind appellants. This argument ignores the fact that Crane was the agent of appellants and was not acting for Kazanjian. The authorities cited are not relevant to the facts of the instant case.

Appellants state that there is no evidence in the record to support the District Court's conclusion that Crane's telegram to Margules required that any contract entered into should be confirmed by the parties to the proposed contract and in particular by Kazanjian. Oddly enough, this argument immediately follows the appellants' point that the trial Court erred in permitting Crane to testify that the use of the phrase "Subject to Confirmation" required the use of a standard confirmation of sale form. This in itself shows the necessity of a confirmation. Both oral testimony and the telegrams themselves showed the necessity for confirmation. However, insofar as Kazanjian is concerned this would again be immaterial. Crane was the agent of appellants not of Kazanjian. The latter by his telegram of October 4th prescribed terms never accepted by appellants and Kazanjian was never a party to a contract with appellants.

**V. KAZANJIAN NEVER ACCEPTED TERMS PROPOSED BY
MARGULES, CRANE OR APPELLANTS.**

Conclusion No. 2 of the District Court (Tr. p. 82), is that Kazanjian never accepted the terms proposed by Margules. Appellants argue that Margules never made any proposal but accepted in behalf of appellants the offer of Kazanjian through Crane. No discussion of the facts is made by appellants although the burden is upon them to support their position. It again overlooks the fact that Kazanjian did not authorize Crane to act in his behalf and that Crane and Margules represented appellants and not Kazanjian. The record shows that the only act of Kazanjian, whether it be acceptance, rejection or a counter proposal, was contained in his telegram of October 4, 1944. It was a rejection of the offer of appellants in Crane's telegram of October 3, 1944, and contained new offers never accepted by anyone.

**VI. THE TERMS CONTAINED IN KAZANJIAN'S TELEGRAM OF
OCTOBER 4, 1944 WERE NEVER ACCEPTED BY APPEL-
LANTS OR ANYONE ELSE.**

Appellants argue that there is no evidence to support the District Court's finding (Tr. p. 82, par. 2) that neither Margules nor appellants accepted the terms proposed by Kazanjian to Crane in his October 4th telegram. The argument takes a peculiar trend. No effort is made to sustain the burden cast upon appellants to show that there was such an acceptance and the record, of course, is devoid of any such evi-

dence. On the contrary, appellants' argument under this point again claims that the October 4th wire of Kazanjian accepted the terms contained in Crane's October 3rd wire. Obviously the one first in date could not be an acceptance of the subsequent wire.

Appellants again argue that there is no substantial difference between the two telegrams. The differences between the two telegrams have been discussed heretofore. Crane's telegram provided for payment by draft upon receipt of inspection reports in Texas; Kazanjian rejected this and required payment in cash in California at the time of inspection. Crane's telegram required that Kazanjian give him the balance of Kazanjian's crop as a part of the deal; Kazanjian refused to do this.

Appellants state on page 42 of their brief that on cross-examination Kazanjian was requested to point out wherein his telegram of October 4th to Crane consisted of different terms (from Crane's telegram), and wherein he designated that the terms under which Crane had sold for Kazanjian's account were not satisfactory to Kazanjian but that the answer was not received because the Court sustained an objection upon the ground the question was argumentative (Tr. p. 186). The objection was properly sustained not only because it was argumentative but also because it assumed something that the Court found was not a fact, i.e., that Crane had sold grapes for Kazanjian's account. As a matter of fact appellants were permitted to examine Kazanjian in detail regarding the

differences between the two telegrams (Tr. pp. 176 to 186, 342 to 345). His testimony outlined clearly the differences that appellants now attempt to forget.

VII. THE STATUTE OF FRAUDS.

Appellants argue that the California statute of frauds is procedural only and is not a bar to an action brought under the Perishable Agricultural Commodities Act. It cites as authority the case of *Rothenberg v. H. Rothstein and Sons*, 183 F. 2d 524 (CCA 3). We have found no Federal cases contrary to the cited case although the Secretary of Agriculture recognized the statute of frauds as being an integral part of the applicable law in this case (Tr. pp. 54-55). However, the point is totally immaterial since it is established by the amply supported findings of the Court that Kazanjian was not a party to any contract and had not authorized Crane to act for him.

Incidentally, in passing, appellants' Point X pertains to the contention that the California statute of frauds is concerned only with the party to be charged, i.e., the defendant in the proceeding. Inasmuch as Kazanjian is one of the defendants and one of the parties to be charged here, it is assumed that appellants contend that Kazanjian did sign a writing and can be charged but since he signed only the October 4th telegram which even appellants do not seriously claim was accepted by them, the relevancy of the authorities cited is not apparent.

The complete answer to this, and many other of appellants' contentions, is that Kazanjian was not a party to any contract.

**VIII. APPELLANTS' CONTENTION THAT THE DISTRICT COURT
ERRED IN FINDING THAT CRANE MADE NO FALSE
REPRESENTATIONS.**

This contention applies only to the defense of Crane and not any answer need be made in behalf of Kazanjian.

**IX. EFFECT OF EMERGENCY PRICE CONTROL ACT
UPON THE CONTRACT.**

The District Court judge found that the maximum ceiling price for grapes had been exceeded by the agreement of appellants to pay \$50.00 per car procurement commission to Crane plus 3½¢ per lug to Southwest Brokerage Company for procurement services (Tr. pp. 80-81, par. IX). As stated in the memorandum opinion, the District Court judge declared that he did not think such finding was necessary for his decision but that if he is reversed by the higher courts he would then hold the contract was in violation of the price regulations. For the reasons heretofore stated there was not any contract in this case which was binding upon the parties hereto and any finding upon the effect of the Emergency Price Control Act was unnecessary. This Court has heretofore decided in *Joseph Denunzio Fruit Company v. Crane*,

188 F. 2d 569, that if a contract similar to that here involved was actually entered into, there was not any violation of the Price Control Act. This case is now pending before the Supreme Court of the United States on a petition for writ of certiorari. As the point is entirely immaterial in the present case because there was in fact not any contract between the parties and in view of the extended arguments which have heretofore been made before this Court, it is deemed unnecessary to reargue the point further.

X. ASSUMING THAT THERE WAS A CONTRACT AND A BREACH AND REPUDIATION OF THE CONTRACT, THE APPELLANTS ACQUIESCED THERETO AND THE MEASURE OF DAMAGES WOULD BE ESTABLISHED BY THE VALUE OF GRAPES UPON THE DATE OF ACQUIESCENCE.

The District Court found that on October 24, 1944, appellants commenced to purchase grapes to replace those which they contended they had purchased from appellees (Tr. p. 79, par. VII), and that on October 10, 1944, and up to and including November 15, 1944, the reasonable market value of U. S. No. 1 Emperor Grapes in carload lots at or in the vicinity of Exeter, California, was \$3.25 per lug (Tr. p. 79, par. VIII). The Court also concluded that assuming there was a binding agreement to buy and sell grapes, the appellants acquiesced in the repudiation of the agreement on October 24, 1944, by contracting to purchase, or purchasing grapes, to replace the grapes covered by the agreement and that the measure of

damages would arise as of October 24, 1944 (Tr. p. 82, par. 4).

Appellants contend that the measure of damages would be established as of December 10, 1944, and not on the date that they so acquiesced.

While the point is immaterial because there was not any contract for Kazanjian to breach and there is not any liability on his part, a brief comment will be made.

There is no attack made upon the sufficiency of the evidence to support the Court's findings. They are amply supported and in the absence of attack there appears no necessity for detailing the evidence upon which they were based.

As indicated by this Court in *Compania Engraw v. Schenley Distillers Corp.*, 181 F. 2d 876, the measure of damages would be fixed as of the date of actual acquiescence in the repudiation of a contract.

In the present case, even had the agreement which appellants claim existed actually existed, appellants knew of the breach and repudiation of any obligation to deliver grapes and acquiesced thereto by actual purchases of grapes replacing a part of those they claim to have purchased. Grapes were available at \$3.25 per lug, the price found by the Court to be the reasonable value during an extended period to November 15, 1944. Appellants had a duty to minimize their loss. They cannot now say that while they knew of the repudiation of contract and acquiesced thereto

and even replaced a part of the grapes as of the date of acquiescence they can later claim the measure of damages is to be based upon some date after the date of acquiescence.

CONCLUSION.

The findings of the District Court which are attacked by appellants are supported by ample and credible evidence. The appellants have not sustained the burden of showing that such findings are clearly erroneous and the findings should be sustained.

Kazanjian at no time entered or authorized or ratified any contract upon which he defaulted or can be held responsible.

The judgment of the District Court should be affirmed.

Dated, Fresno, California,
August 31, 1951.

Respectfully submitted,

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No. 12884.
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

CENTRAL FRUIT & VEGETABLE Co., and WEST TEXAS
PRODUCE COMPANY,

Appellants,

vs.

ASSOCIATED FRUIT DISTRIBUTORS OF CALIFORNIA, RAY-
MOND M. CRANE, RED LION PACKING COMPANY and
JOHN C. KAZANJIAN,

Appellees.

Appellants' Reply to Brief of Appellee John C. Kazan-
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pany.

I.

Appellants Have Not Misconstrued Section 499g(c)
of the Perishable Agricultural Commodities Act.

Accusing appellants of overlooking elementary principles of law (Kazanjian Br. p. 3), Kazanjian apparently contends that the *prima facie* effect of the findings of the Secretary of Agriculture need not be *overcome* by contradictory evidence. Kazanjian nevertheless cites the very cases which hold that the *prima facie* evidence stands *until overcome* by other evidence.

The second elementary principle of law which Kazanjian claims we have overlooked is the rule that findings of a

trial court, supported by competent evidence, will not be set aside unless such findings are clearly erroneous. Not only have we not overlooked such well established rule of law, but we gave affirmative expression to it in our opening brief. (Our Op. Br. pp. 34-35.)

Kazanjian's brief is replete with assertions that the findings and conclusions of the District Court are "amply supported" by the evidence. Kazanjian then leaves to the imagination where such support may be found in the record. Kazanjian charges appellants with overlooking record evidence adverse to appellants. In our opening brief we were painstaking in supporting every assertion made with transcript references. We attempted to be as objective as possible, and we referred to the evidence whether deemed adverse to our position or not. Similar candor and objectiveness is not to be found in Kazanjian's brief.

II.

Crane Acted for Both Kazanjian as Seller and Appellants as Buyers.

Kazanjian argues that Crane was solely and exclusively the agent of the appellants. Since Kazanjian's argument offers nothing new or additional to the argument upon this point made in the brief of appellee Crane, we adopt by reference our reply to Crane's brief upon this subject matter.

In the case of *Prentice Packing and Cold Storage Co. v. Springer Produce House*, P. A. C. A., Docket No. 93, S. 129, the Secretary of Agriculture declared:

"It is the usual custom throughout the produce trade for the broker to act for both seller and buyer in negotiating sales of this nature * * *."

It will be apparent that Crane acted as a broker who served to bring two parties together in a contract of sale. Appellees ignore the distinction between a broker and a mere agent. They fail to comment upon the cases which hold that in so far as a broker transmits offers and counter-offers between parties, he becomes the agent of each. Appellees are eloquently silent as to the testimony of Kazanjian that Crane acted as his agent in tendering grapes to appellants at \$3.25 per lug. [Tr. pp. 289, 481.] Appellees ignore the evidence that Crane notified Kazanjian that he had sold for Kazanjian's account, both in a telephone conversation and in writing. [Tr. pp. 453, 308, 309.]

As heretofore pointed out, Kazanjian is liable for his breach of contract whether Crane was his agent or not. In view of the evidence, however, that Kazanjian, on October 4th, by telegram, ratified the sale made by Crane as Kazanjian's agent, we insist that a finding that Crane did not act as agent for Kazanjian is clearly erroneous. Kazanjian denies that his October 4th telegram was a ratification, and asserts that it constituted a rejection of Crane's sale and a counter-offer. We shall discuss this argument in our next point.

III.

Kazanjian Fails to Establish That a Binding Contract Had Not Been Entered Into Between Him and Appellants.

In Kazanjian's brief no contention is made that any of the written documents in this case are ambiguous. Kazanjian also fails to challenge the rule that in the absense of ambiguity, mistake, or fraud, the intention of the parties must be determined from the writings themselves, without resort to extraneous evidence.

Kazanjian insists that his telegram of October 4th did not constitute an acceptance or ratification of Crane's telegram to Kazanjian of October 3rd. Kazanjian states that there are material differences in the terms set forth in each of such documents. The District Court made no finding which specified such differences.

It is unbelievable that any person engaged in the produce industry could read Kazanjian's October 4th telegram as a rejection of the transaction. Crane, in his testimony, admitted that there was no material difference in the terms mentioned by Kazanjian in his October 4th telegram from the terms stated by Crane in his October 3rd telegram. [Tr. p. 310.]

This Court may judicially note that the Secretary of Agriculture is called upon to decide thousands of cases of this type, and consequently, is much better qualified than the District Court to construe such a contract. The Department of Agriculture here is in somewhat an analogous position to the Tax Court, which is recognized to have particular competence in tax matters. (*Dobson v. Commissioner of Internal Revenue*, 64 S. Ct. 239, 320 U. S. 489, 88 L. Ed. 248.)

The Department of Agriculture found that on October 3rd, Crane notified Red Lion by telegram that the sales of the ten carloads of grapes here involved "had been completed," and that "the following day Red Lion (Kazanjian) replied by telegram that this was satisfactory." [Tr. p. 50.] Referring to the October 4th telegram from Kazanjian to Crane, the Department of Agriculture concluded:

"this exchange of telegrams constituted a ratification by Red Lion (Kazanjian) of the sale of the ten carloads of grapes to complainants." [Tr. p. 57.]

The first of the differences which Kazanjian claims to exist, refers to the element of *time* when the deposit of \$1,000.00 per car for the ten cars was to be made. Crane's telegram provided that the deposit be paid "upon receipt U. S. ONE Government inspection." Kazanjian's telegram stated "deposit to be made immediately on inspection at shipping point." Kazanjian argues that his language was a rejection of Crane's language. Crane was referring to the "time" of payment, and Kazanjian was referring to the "time and place" of payment. The place of payment was Exeter, for it was there that the seller was located. Neither Crane nor appellants ever suggested that payment be made at any other place. Crane instructed Margules to collect the deposits and to forward them to Crane as soon as Government inspection was wired on each car. [Tr. p. 25.] Thus, Crane was to be in a position to deliver the funds to Kazanjian at Exeter as soon as there was telegraphic notification that the grapes had passed the government inspection. No one ever suggested, as Kazanjian infers, that appellants were to pay Kazanjian in Texas.

The most reliable test as to whether the October 4th telegram differed from the October 3rd telegram is found in Crane's testimony, as follows:

"Q. Was there anything in the telegram that indicated to you that Mr. Kazanjian was quoting terms different from, or other than those terms which he had authorized you to confirm to the Southwest brokerage firm? A. They are the same terms that we offered to the Southwest Brokerage Co.." [Tr. p. 310.]

The next alleged "point of difference" urged by Kazanjian is Crane's language:

"Depending you handle through us balance of cars you mentioned for fresh shipment—advise when expect ship these."

The foregoing language is significant also on the matter of the agency between Crane and Kazanjian, for we find Crane, after the completed sale, asking that the balance of the crop be handled by Kazanjian *through Crane*.

Kazanjian argues that this was a condition to Crane's offer, and that it was rejected by Kazanjian stating:

"balance of pack intended to load after October Twentieth. Will be glad to make deal on same about October Fifteenth."

It is ridiculous to construe Crane's request that he be permitted to handle the balance of the grape crop as a condition to the transaction. Crane was referring to a completed sale. In the same message he was soliciting further business from Kazanjian.

It is equally ridiculous to construe Kazanjian's reply as a rejection of Crane's request. In his telegram to Kazanjian, Crane says that with respect to the "balance" of the cars "advise when expect ship these—believe we could place them now * * * suggest give us proximate shipping dates."

Instead of rejecting this invitation to handle the additional cars as Kazanjian's agent, Kazanjian appeared very amenable and replied:

"balance of pack intended to load after October 20th—*will be glad to make deal on same about October 15th.*"

It is true that Kazanjian testified that his telegram was intended by him as a rejection of Crane's proposal of new terms. This self-serving testimony is rebutted by the very language he authored, and by Crane's testimony aforementioned. It is refuted by the construction of the Secretary of Agriculture. For the District Court to have based its finding upon such self-serving testimony and in disregard of the expressed written documents constitutes a clear case of error.

Kazanjian's argument can be compared to that of the appellees in the recent case of *Propstra v. Dyer Sugar Trading Corp.*, 189 F. 2d 810, in which case the Court of Appeals for the Second Circuit reversed the trial court and said:

"We are satisfied that a contract between Propstra and Dyer was made on September 11. Dyer's claim that its telegram and letter of that date were a rejection of plaintiff's proposal of September 10 and constituted a counter-offer because 'October sellers option' stated a different shipping period from that described by the words 'as soon as possible or latter part of September or early October' in the plaintiff's telegram is highly artificial . . ."

A still further argument is made by Kazanjian, this one for the first time on appeal. On page 16 of his brief, Kazanjian says:

"Appellants, by their pleadings and testimony, claim to have purchased ten cars, yet the two telegrams refer to fifteen cars."

Does Kazanjian now contend that the fifteen cars mentioned in these telegrams did not include the ten cars purchased by and sold to appellants?

It so happens that Kazanjian's breach of contract as to three of the remaining five cars reached this court on appeal of *Joseph Denunzio Fruit Co. v. Crane*, Docket No. 12884, 188 F. 2d 569.

The pointlessness of this new contention is characteristic of the extent to which Kazanjian will go to escape liability in this case.

Kazanjian's showing of differences between the October 3rd and October 4th telegrams culminates with what he calls a "contingent term," to wit: that Crane, in his wire, told Kazanjian that he would forward confirmations for Kazanjian's signature as soon as he received them via airmail from the buyers. (Kazanjian's Br. p. 17.) We do not know what Kazanjian means by a "contingent term." Perhaps he means that such specification was a "condition precedent" to the contract. However, Crane's telegram to Kazanjian of October 3rd was not an offering of terms. It was a written confirmation of the fact that Crane had already sold for Kazanjian's account upon authority previously received in a telephone conversation. Crane testified to this telephone conversation, and testified that Kazanjian had told him to go ahead and confirm the transaction. [Tr. pp. 308-309.]

Crane's promise to send confirmations to Kazanjian for his signature was not a condition to the contract, the contract having already been consummated. Kazanjian immediately ratified the sale without waiting for any signed confirmations. Crane did not request such written confirmation from appellants. Reference to the record of the *Denunzio* case will reveal that Crane had informed the broker for Denunzio, one A. B. Rains, that Crane would forward confirmations to Rains to be signed by Denunzio, and then returned to Kazanjian for the signature of

Kazanjan. Apparently, he was referring to these confirmation forms. It will be also noted in the Denunzio record that Crane never sent such confirmations to Rains, but accepted Rains' Standard Memorandum of Sale.

Kazanjan does not comment upon the authorities cited in our opening brief holding that the failure to reduce a contract of sale to a precise form intended by the parties does not prevent the agreement from being effective. (Our Op. Br. pp. 32-33.)

IV.

Kazanjan Fails in His Attempt to Support the District Court Finding That Crane Intended to Designate a Standard Confirmation.

This point was argued extensively in our reply to the brief of appellee Crane. We shall avoid repetition and hereby adopt by reference the arguments propounded by us in our reply to the Crane brief.

We wish merely to reassert once again that the words "subject to confirmation" clearly refer to confirmation by the seller, and need not be in writing. The phrase is not ambiguous, and its meaning is particularly evident when construed within the definitions promulgated by the Department of Agriculture.

In the case of *Milliken-Tomlinson Co. v. American Sugar Refining Co.*, 9 F. 2d 809, at page 813, the Court of Appeals for the First Circuit said:

"As to the first contention, the orders expressly provided that they were 'subject to acceptance' by plaintiff. These terms are not ambiguous. They did not require a signed acceptance. A written offer does not require a written acceptance in order to create a valid and binding contract." (Citing cases and Williston on Contracts (1920) 586.)

V.

Kazanjan Has Failed to Show the Existence of Any Evidence Supporting the Trial Court's Conclusion That Kazanjan Had Never Accepted the Terms Proposed by Margules.

In a short paragraph on page 20 of his brief, Kazanjan seeks to defend conclusion number two of the District Court. [Tr. p. 82.] He asserts that appellants have not sustained their burden to establish a lack of evidentiary support. Although we devoted less than a page to this argument, we directed attention to *all of the communications from Margules to Crane*, consisting of items 2, 5, 7 and 10 of the appendix to appellants' opening brief. (Our Op Br. p. 41.) We stated that these documents do not reveal the proposal of any terms by Margules. We can refer to the transcript, pages 1 to 486, inclusive, in no portion of which will be found evidence oral or documentary that Margules proposed any terms to Crane.

Kazanjan states that the record shows that the only act of Kazanjan, whether it be acceptance, rejection, or a counter-proposal, was contained in his telegram of October 4, 1944. (Kazanjan's Br. p. 20.) Attention is directed to the testimony of Crane, that Kazanjan had orally authorized Crane to confirm the sale. Crane testified that prior to the telegram of September 26, 1944, he had discussed the terms of the sale with Kazanjan, and Kazanjan had stated that if Crane had any business at that price he would think about confirming it. [Tr. pp. 212-213.] Crane testified that Kazanjan confirmed

the change of price from \$2.53 per lug, originally quoted, to \$2.50 per lug. [Tr. p. 213.] Crane testified that he had a telephone conversation with Kazanjian on October 2, 1944, in which Kazanjian told him to confirm the sale. [Tr. pp. 308-309.]

VI.

Kazanjian Has Failed to Show Support of the District Court's Conclusions That the Terms Contained in Kazanjian's Telegram of October 4th Were Never Accepted by Appellants.

The error in the District Court's conclusion number two which we have charged is not that there was an acceptance of terms proposed by Kazanjian in his telegram of October 4, 1944, but that the District Court erred in finding that any terms were proposed by Kazanjian on October 4th.

It is only necessary to read the text of such telegram to show the futility of Kazanjian's effort to make a proposal out of a ratification. Point III of this brief covers this subject matter.

VII.

Kazanjian Now Admits That the Statute of Frauds Is Not a Defense to This Action.

At one time, the only substantial issue in this case was the California Statute of Frauds. Thus, the Secretary of Agriculture said:

"The most important and perhaps the only real issue here is whether a contract was made which is enforceable under the California Statute of Frauds."
[Tr. p. 54.]

This defense was extensively argued before the District Court, and found its way into the Findings of Fact and Conclusions of Law of the District Court. [Tr. pp. 79, 80, 82.] Since the trial of this case, the Court of Appeals for the Third Circuit has convincingly established that the Statute of Frauds does not apply to this type of proceeding. (*Rothenberg v. H. Rothstein & Co.*, 183 F. 2d 524.)

In the District Court, Kazanjian and Crane both insisted, and induced the District Court to conclude, that the statute of frauds operates as to all parties of the proceeding, and that the contract failed because appellants (not the parties to be charged) had not signed a written memorandum of the transaction other than through Margules, as their broker and agent.

Crane, in his brief, avoided the issue entirely, adopting whatever argument that Kazanjian would make. Kazanjian now argues that the whole issue is immaterial, because, he says:

“It is established by the amply supported findings of the Court that Kazanjian was not a party to a contract, and had not authorized Crane to act for him.”

It is safe to assume, therefore, that the defense of the Statute of Frauds has been abandoned and Kazanjian now relies entirely upon the finding that Kazanjian was not a party to a contract, and that Crane had no authority from him to act in this transaction. These questions have already been dealt with in this brief.

VIII.

**Kazanjan, in Effect, Admits That the Contract Was
Not Void for Violation of the Emergency Price
Control Act.**

This was one of the defenses born after the trial before the Secretary of Agriculture and prior to the trial in the District Court. In view of the decision of this Court in *Joseph Denunzio etc. v. Crane*, 188 F. 2d 569, Kazanjan now informs us that the point is entirely immaterial in the present case, and relies solely upon the alleged absence of a contract between the parties. The alacrity with which appellees have abandoned the defenses of the Statute of Frauds and illegality of contract is illustrative of the lack of integrity that surrounds each and all of the defenses urged by appellees.

IX.

**In the Absence of Acquiescence, the Date of Delivery
Under the Contract Is the Date to Be Used for
Measuring Damages.**

Oddly enough, Kazanjan and appellants both rely upon the same case, to wit: *Compania Engraw v. Schenley Distillers Corp.*, 181 F. 2d 876, decided by this Court. The point of difference rests with a determination of whether, by purchasing replacement grapes on October 24, 1944, appellants had *acquiesced* in the repudiation of the contract. Kazanjan's brief merely assumes such acquiescence.

To the extent that appellants purchased replacement grapes prior to December 10, 1944, their claim for damages has only been for the difference between the contract price and the cost of the replacement grapes. Appellants had the right to replace part of the grapes, and wait until after the delivery date as to the balance of the grapes sold under the contract. As determined by the District Court in *Joseph Denunzio et al. v. Crane*, 79 Fed. Supp. 117, 130:

“Under the law, Joseph Denunzio, in the purchase of these three cars of grapes to compensate for the three cars which Raymond M. Crane and/or J. C. Kazanjian refused to ship under the breached contract, was not obliged to anticipate at his peril, that the cost of grapes would be less prior to December 10, 1944, than afterward; in other words, he could wait until delivery time and then purchase at the best price obtainable, and recoup his cost by way of damages.”

Had the price been lower on December 10th than it was in October of 1944, then assuredly, appellees would have contended that appellants should have waited until after December 10th before making replacement purchases. Kazanjian blows hot and cold, depending upon the temperature most suitable to his ends. We believe that the Secretary of Agriculture was correct in his finding that complainants made diligent effort to secure replacement of grapes after being informed of the breach [Tr. p. 51], and that he was correct in his conclusion that the measure of damages is the loss directly and

entirely resulting from the seller's breach of contract, to wit: the difference between the price agreed to be paid and the market value when the goods ought to have been delivered. [Tr. p. 59.]

To have been consistent with its finding that no contract existed between the parties, it was injudicious for the District Court to make findings with respect to the measure of damages. The expressed purpose of the District Court was to discourage an appeal, and the District Court thereupon adopted the least possible measure of damages. [Tr. pp. 258-259.]

X.

Conclusion.

Kazanjian relies entirely upon a tenuous and completely unreasonable interpretation of his October 4th ratification telegram as a rejection and counter-offer. This case is simplified by the Kazanjian brief because it narrows the issues on appeal to an interpretation of the October 3rd and October 4th telegrams. The Court of Appeals for the First Circuit in the case of *Milliken-Tomlinson Co. v. American Sugar Refining Co.*, 9 F. 2d 809, at pages 813 and 814, referred to similar contentions as being "insubstantial" and "mere quibble." That Court recognized that such discrepancies are frequently unduly exaggerated by the exigencies of the case, and quotes *Mr. Justice Van Devanter* in the case of *A. B. Small Co. v. American Sugar Refining Co.*, 267 U. S. 233, 45 Sup. Ct. 295, 69 L. Ed. 589, as follows:

"In such circumstances a court should be solicitous to find, as the parties evidently did before they became hostile, an accord between the two instruments."

It was not until October 10, 1944, when the ceiling price on grapes was vacated, that anyone urged that a contract had not been fully and completely consummated between Kazanjian and appellants.

We respectfully urge reversal of the District Court decision, reinstatement of the judgment against Kazanjian, attorneys' fees as provided by the Perishable Agricultural Commodities Act, and costs herein.

Respectfully submitted,

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No. 12884.

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

CENTRAL FRUIT & VEGETABLE CO., and WEST TEXAS
PRODUCE COMPANY,

Appellants,

vs.

ASSOCIATED FRUIT DISTRIBUTORS OF CALIFORNIA, RAY-
MOND M. CRANE, RED LION PACKING COMPANY and
JOHN C. KAZANJIAN,

Appellees.

Appellants' Reply to Brief of Appellee Raymond M.
Crane Doing Business as Associated Fruit Dis-
tributors of California.

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tributors of California.

I.

Preliminary Observations.

Appellee Crane's brief is distinctive by its avoidance of many of the principal issues of this case. Since such silence constitutes inferential admission, attention is directed to many of the principal points left uncontroverted by Crane, to wit:

1. The written communications exchanged by the parties are complete and unambiguous, and constitute a binding agreement of sale upon Kazanjian as seller and appellants as buyers. (Our Op. Br. p. 27.)

2. Where no ambiguity is contained in a written contract, the construction of the contract must be derived solely from the language therein. (Our Op. Br. p. 35.)

3. An appellate court is not bound by the interpretation given to written documents by the trial court. (Our Op. Br. p. 35.)

4. Findings of fact, although supported by some substantial evidence, are not binding upon an appellate court where they are clearly against the weight of the evidence, or are induced by an erroneous view of the law. (Our Op. Br. p. 34.)

5. The contention that a Standard Confirmation of Sale was a requirement of the contract of this case was never mentioned in the correspondence between the parties or in the proceedings before the Secretary of Agriculture. (Our Op. Br. p. 33.)

6. Where there has been a meeting of the minds of contracting parties, the subsequent failure to reduce the contract to a precise form is immaterial. (Our Op. Br. pp. 32, 33.)

7. The Standard Rules and Definitions of Trade Terms for the Fruit and Vegetable Industry promulgated by the Department of Agriculture defines the phrase "subject to confirmation" as the method of providing that the seller must accept the buyer's order before it becomes binding. (Our Op. Br. pp. 35 and 36.)

8. Evidence of an undisclosed intention of a contracting party is immaterial and inadmissible. (Our Op. Br. pp. 36 to 38.)

9. The contract was not void for reason of a violation of the Emergency Price Control Act. (Our Op. Br. p. 49.)

10. The market price as of the date when delivery may rightfully be demanded by the buyer and not the market price on the date of the anticipatory breach is the correct measure of damages. (Our Op. Br. pp. 49 to 52.)

With respect to appellants' contentions (1) that the District Court erroneously applied the Statute of Frauds as a bar to recovery (Our Op. Br. pp. 44 to 47), and (2) that the District Court erred in concluding that Kazanjian and Margules had never accepted each other's proffered terms (Our Op. Br. pp. 41 to 43), appellee Crane states that "any argument" presented by counsel for Kazanjian thereon is adopted by Crane. (Crane's Br. p. 21.) *This wholesale adoption of an argument in futuro, valid or not, is an unbelievable display of confidence, between parties presumably adverse in interest to each other.*

II.

**Crane Was Broker for Both Parties and Not Merely
the Agent of the Buyers.**

A major portion of Crane's brief (pp. 4-15) is devoted to a denial of appellants' contention that Crane was a broker acting both for Kazanjian, the seller, and for appellants, as buyers. In our Opening Brief (p. 24) we pointed out that the issue of agency is not a critical one, and that Kazanjian is liable for the breach of contract irrespective of whether he breached the contract through Crane as agent for the seller or through Crane as agent for the buyers, or, as we contend, through Crane acting as a broker for both buyers and seller.

Crane asserts that appellants in their complaint before the Secretary of Agriculture merely alleged that Crane had acted for himself and as agent of Kazanjian, the seller. Such allegation does not afford comfort to Crane's contention that he was exclusively the agent of appellants. The breach of contract charged in the complaint was the act of Kazanjian, as seller, through the offices of Crane, a licensed broker, in his capacity as agent of the seller.

It is true that the Secretary of Agriculture's findings did not specifically find that Crane acted as both agent for buyers and the seller. The Secretary filed a "Preliminary Statement, Findings of Fact, Conclusions, and Order." [Tr. p. 41.] In the "Conclusions," the Secretary of Agriculture stated that the ordinary function of a broker is to handle negotiations between contracting parties, that he may initially be the limited agent of one party, and then become the agent also of the other party when permitted to transmit offers or counter-offers for them. He further concluded that the fact that one of the

parties is to pay a broker's commission does not necessarily mean that the broker acts solely as agent for that party. [Tr. p. 53.] That Congress did not intend to limit the effect of the Secretary's fact findings as the established facts of the case to merely formal findings of fact is evidenced by the language of Section 499g(c), Title 7, U. S. C. A. Such Act specifically provides that the "findings of fact *and the orders*" of the Secretary shall be *prima facie* evidence of the facts of the case. It is the expressed congressional intent that the factual findings contained in the *entire* order made by the Secretary of Agriculture become *prima facie* evidence of the facts of the case.

Crane urges that appellants admit that Crane was their agent. Inasmuch as Crane, a broker, was acting as agent for both buyers and the seller, it follows that he was also the agent for appellants. It does not follow that he was solely or exclusively the agent of appellants.

Crane refers to testimony of Crane and Kazanjian that Crane was not the agent of Kazanjian. This evidence consists merely of self-serving conclusions. Not only is such evidence insufficient to overcome the *prima facie* effect of the Secretary's findings, but the self-serving conclusions of appellees are refuted by their *admitted conduct*. Crane's brief does not deny that he sent a telegram to Kazanjian informing Kazanjian that *Crane had sold the grapes for the account of Kazanjian*. [Tr. p. 453.] Crane does not deny that *Kazanjian admitted* that after Kazanjian refused to go through with the deal, *Crane acted as Kazanjian's agent* in offering to deliver the grapes for a higher price. [Tr. p. 289.] Nor does Crane deny that on October 4, 1944, Kazanjian sent a telegram to Crane approving the sale by Crane of the

grapes for *Kazanjian's account*. [Tr. p. 454.] Certainly the undisputed conduct of the parties negatives any probative value of self-serving declarations contradicting admitted conduct.

That Crane was acting as Kazanjian's agent for the sale of Kazanjian's grapes is further evident from the telegram sent by Crane to Kazanjian on October 3rd. Crane said, "Referring telephone *have sold for your account* * * * block Emperors mentioned * * * now depending you handle through us balance cars you mentioned for fresh shipment." [Tr. p. 453.] Having acted as Kazanjian's agent in selling one block of grapes for Kazanjian's account, Crane was asking Kazanjian to use Crane as his agent in the sale of additional cars mentioned by Kazanjian to Crane.

The denials of Kazanjian and Crane that Kazanjian had given Crane authority to act as his agent are rendered nugatory by Kazanjian's ratification of Crane's authority to act in his behalf—by telephone on October 2d [Tr. pp. 308-309] and by telegram on October 4th. [Tr. p. 454.] Even if such authority had been absent at the commencement of the negotiations, the ratification is "equivalent to previous authority, and results as effectively to establish the relations of principal and agent as if the agency had been authorized in the beginning."

Ballard v. Nye, 138 Cal. 588, 72 Pac. 156.

Crane's brief contends that a broker is the agent of the person who pays his compensation. Cases cited by Crane in support of such argument go no further than to hold that payment of compensation is indicative of such agency. None of the cases cited indicate such factor to be con-

clusive of such relationship. All of the cases cited by counsel are decisions of the Secretary of Agriculture. The Secretary in the instant case, specifically held that the fact that one of the parties is to pay the broker's commission does not necessarily mean that the broker acts *solely* as agent for that party. [Tr. p. 53.]

III.

“Part Payment With Confirmation” and “Offer Subject to Confirmation” Do Not Mean a Standard Confirmation of Sale.

Commencing with page 16 of Crane's brief, we find an argument entitled “Answer to Contention That a Standard Confirmation of Sale Was Not Necessary.” Here, Crane attempts to defend a conclusion of law holding that the telegrams which Crane sent to Margules contained a requirement that any contract which the parties entered into was to be confirmed in writing by such parties. [Tr. p. 82.] This argument is difficult to follow since Crane interlocks such contention with defense of a finding to the effect that Crane, when he used the words “\$500.00 part payment with confirmation” and the code word “ADLAM,” meaning “offer subject to confirmation,” intended by such language that the sale be negotiated by Standard Confirmation of Sale. [Tr. p. 77.]

The argument is hopelessly confused by the interchangeable use of the terms “confirmation in writing” and “Standard Confirmation of Sale.” The former phrase is a general and descriptive one. The latter refers to a particular form of document.

We asserted as error both the conclusion of law and the finding of fact hereinabove referred to. We ad-

dressed our arguments on each separately, and any intelligent consideration must be predicated upon separate consideration of each.

The error charged against the conclusion that the telegrams from Crane to Margules required written confirmation by all parties, is based upon the fact that such telegrams do not expressly or inferentially contain such requirement.

Crane argues that the language "part payment with confirmation" and "offer subject to confirmation" in Crane's September 26th telegram calls for written confirmation by all parties. Confirmation consists of the act of confirming or of ratifying. Confirmation or ratification may be oral or it may be by writing. (*Milliken-Tomlinson Co. v. American Sugar Refining Co.* (C. C. A. 1), 9 F. 2d 809, 813.)

Crane advised the brokers to whom he was offering Kazanjian's grapes for sale, that his *offer* was subject to confirmation, or, in other words, that the offer was subject to the seller's acceptance or ratification. He was referring to confirmation of the *offer*, not the entire transaction. Nor did he indicate that such confirmation had necessarily to be in writing or upon a particular form. Crane's conduct in wiring Margules that he had secured Kazanjian's confirmation after his telephone conversation with Kazanjian, makes crystal clear that *Crane was not referring to written confirmation*, or to confirmation from other than the seller. The use of the word "confirmation" in connection with the phrase "part payment with confirmation" is strictly a reference to "time." The terms of the offer provided for part payment of the purchase price at the *time* when the act of confirmation

took place. Subsequently Crane modified these terms by providing that the part payment was to be made *at the time* of government inspection when the grapes were loaded. [Tr. p. 476.] Even had the September 26th telegram provided for written confirmation by all of the parties hereto, both buyers and seller did in fact confirm the transaction in writing. Margules' written messages ordering the grapes and accepting the terms submitted by Crane embraced all of the elements of confirmation. Kazanjian, the seller, confirmed both orally and in writing. [Crane's Br. p. 22 ff., and Tr. p. 25.]

The District Court apparently decided that the Standard Memorandum of Sale sent by Margules to Crane was not the appropriate form of confirmatory document, and that a contract failed to come into existence because of the failure to use a Standard Confirmation of Sale form. Other than making descriptive findings as to the existence and use of the two forms known as Standard Memorandum of Sale and Standard Confirmation of Sale [Tr. pp. 77, 78], the District Court made no finding with respect to a Standard Confirmation of Sale except that when *Crane* used the words "part payment with confirmation" and "offer subject to confirmation," *Crane intended* that such sale be negotiated by a Standard Confirmation of Sale. [Tr. p. 77.]

The District Court did not and could not find that such language by custom or otherwise, conveyed such meaning. Crane's failure to take issue with the meaning of "subject to confirmation" as defined by the Standard Rules and Definitions of Trade Terms for the Fruit and Vegetable Industry, is highly eloquent. (Our Op. Br. p. 35.) Does Crane intend to infer that every time the

words "part payment with confirmation" or "subject to confirmation" are used in the perishable fruit industry, that the parties are directing a use of the form known as Standard Confirmation of Sale? If so, such inference is refuted by some 4000 reported decisions of the Secretary of Agriculture under the Perishable Agricultural Commodities Act, in not a single one of which has such a contention ever even been suggested! (See Digest of Decisions of the Secretary of Agriculture Under the Perishable Agricultural Commodities Act, second revised edition.)

Were we to suppose that Crane did intend a Standard Confirmation of Sale, the language he used failed utterly to disclose such intention. Our authorities establishing that an undisclosed intention cannot be the basis of a contractual provision only meet with further eloquent silence in the Crane brief. (Our Op. Br. pp. 38-39.)

Crane argues that *he* had testified that, in accordance with a custom of the trade, a standard confirmation of sale is *always* required in the case of a sale for *future delivery*. Such a custom was not pleaded in this case. The District Court did not find the existence of such custom. The evidence was insufficient to support a finding of custom. The existence of a usage or custom can only be proved by *numerous instances of actual practice*, and not by the opinion of a witness. (*California Fruit Exchange v. Henry*, 89 Fed. Supp. 580, 586.)

One seeking to establish a custom has the burden of proving it by evidence "*so clear, uncontradictory and distinct as to leave no doubt as to its nature and character.*" (*California Fruit Exchange v. Henry*, *supra*.) The existence of such custom in the instant case was attempted

to be proved by a single witness. The testimony was neither clear nor uncontradictory, nor distinct. In fact, it was refuted and contradicted by the testimony and conduct of the witness himself. Crane admitted that as a matter of custom, the selection of the form of document was strictly an *individual matter*. [Tr. p. 246.] Most significant of all, is Crane's own conduct. Crane admitted that during the remainder of the year 1944, he sold all of Kazanjian's grapes, that all of such grapes were sold for future delivery, and not in a single instance did he obtain a Standard Confirmation of Sale. [Tr. p. 247.] Crane admitted that once he received the Standard Memorandum of Sale from Margules, he considered no other document necessary for the closing of the transaction other than the government inspection reports. [Tr. p. 249.]

In defense of the conclusion that the telegrams from *Crane to Margules* required signatures of all parties, Crane refers to his *telegram to Kazanjian* of October 3rd which stated "will forward confirmations for your signature soon received airmail from buyers." Margules promptly sent a Standard Memorandum of Sale to Crane. Crane could have sent it to Kazanjian for signature. He did not do so apparently because Kazanjian did not insist upon a confirmation for his signature. Instead he sent a telegram to Crane notifying him that the sale was satisfactory. [Tr. p. 454.] This telegram, in accordance with Crane's own testimony was sufficient substitute for a Standard Confirmation of Sale. [Tr. pp. 245, 246.]

There is nothing in the telegrams and teletype messages exchanged between Crane and Margules that warrants the conclusion that a Standard Confirmation of Sale would

have to be signed by Kazanjian or by the buyers. A possible explanation of Crane's October 3rd statement to Kazanjian that he would forward confirmations as soon as he received them from the buyer, is found on pages 232 and 233 of the Record of Transcript, U. S. Court of Appeals (Ninth Circuit), Docket No. 12662 in the case of *Joseph Denunzio Fruit Company v. Raymond M. Crane*. It will be noted that the *Denunzio* case involved the sale of the remaining 5 of the 15 carloads referred to in Crane's October 3rd telegram to Kazanjian. Crane had by teletype of such date assured A. B. Rains, the broker for Denunzio, that *Crane would forward two copies of a confirmation* for the signatures of the buyers. Rains thereupon replied that he would air mail the checks with the signed confirmations *when he received* "your copies."

No similar arrangement was effected with Margules. Appellants are not affected by the negotiations between Crane and some other broker. Without question the signing of confirmations was strictly a formality and not a condition of the contract. Kazanjian evidenced his acceptance of the sale in writing. There is no reason to believe that if Kazanjian had insisted upon signatures of the buyers on a specific form of confirmation (the record does not reveal such a demand), that the buyers would not have furnished same upon request.

The conclusion that the telegrams *from Crane to Margules* required a written confirmation signed by all parties, is apparently predicated upon the finding that Crane, in his telegram of September 26, 1944, by the use of the words, "part payment with confirmation" and "offer subject to confirmation," intended that a Standard Confirmation of Sale be used by all parties. [Tr. p. 77.]

The finding does not support the conclusion, the conclusion referring to a generality and the finding referring to a specific form. Nor is the finding supported by the evidence. The language of the telegram being unambiguous, it was improper for the District Court to inject an additional meaning foreign to the natural import of the language used.

In the case of *El Zarape Etc. Factory v. Plant Food Corp.*, 90 Cal. App. 2d 336, 203 P. 2d 13, the court said:

“No ambiguity appears in the contract. It must, therefore, be considered as containing all of the terms agreed upon by the parties, and there can be no evidence of the terms agreed to other than the contents of the writing. (Code Civ. Proc., §1856.) The ultimate effect of Carranza’s testimony is to add by parol an additional term not embodied in the written contract. The parol evidence rule is not a rule of evidence. It is one of substantive law. If evidence of conversations and negotiations preceding or contemporaneous to the execution of the writing is admitted it must be ignored. It has no legal force.”

The requirement of a Standard Confirmation of Sale was a fiction adopted many years after the transaction had been completed. It was neither intimated nor suggested until the trial *de novo*. Only the lifting of the ceiling price was mentioned as an excuse for non-delivery of the grapes in the correspondence which followed the breach of contract. Ample opportunity for mention of the allegedly “fatal” absence of a Standard Confirmation of Sale existed in the pleadings and in the trial proceedings before the Secretary of Agriculture. Further opportunity was available to Kazanjian to mention the point in his petition before the District Court setting forth the

grounds upon which he sought to defeat the right of appellants to recover damages. [Tr. pp. 5 to 12.] Crane had opportunity to assert the defense in his amended answer in the District Court. [Tr. p. 64.] Both appellees could have mentioned the point in the testimony given by them in April of 1950 upon depositions taken prior to trial. [Tr. pp. 267 ff., 299 ff.] Not even in the pretrial briefs filed with the District Court was it suggested that the contract of sale called for a Standard Confirmation of Sale, or that because of the lack of such document, a contract had failed to come into existence.

An appellate court may be bound by findings of the trial court where the evidence is conflicting and there is substantial evidence to support the finding reached by the trial court. Where the finding purports to change the plain language of an unambiguous written document, where the testimony consists of self-serving declarations of an interested party claiming that the language he used was intended by him to have a different and special meaning, where custom is neither pleaded nor found to exist, where the testimony of a single witness is relied upon to establish custom without evidence of numerous instances of such practice, where the testimony of custom is not clear or reasonable, and is contradicted by the other testimony and the conduct of the same witness, and, where the artificial meaning sought to be injected into the contract was apparently conceived almost six years after the transaction itself and was not mentioned in extensive correspondence and trial proceedings that preceded the trial in the District Court, it would be a woeful deficiency of our appellate judicial system if an appellate court was helpless to rectify the clear mistake and error of the trial court in the making of such finding.

IV.

If Kazanjian Did Not Confirm the Sale, Crane Was False in Representing That He Had Done so.

It is but fair to say that we agree with Crane that his representation that he had secured Kazanjian's confirmation was not a false representation.

Crane cites the findings of the Secretary of Agriculture to the effect that Kazanjian had orally confirmed the sale in a telephone conversation on or about October 2, 1944. (Crane's Br. p. 23.) The District Court finding, however, was ambiguous as to this telephone conversation. The District Court found that Kazanjian had informed Crane that he was willing to sell 15 cars of grapes "upon the terms to be set forth in a confirmation." [Tr. p. 75.] This latter quoted portion of the District Court's findings qualifies the oral confirmation. If such qualification could be supported by the evidence, then Crane had no right to report an unqualified confirmation, and such representation was false and untrue. Inasmuch as the qualification is not supportable by the record, Crane has a right to deny the falsity of his representation.

V.

If Crane Contemplated the Use of a Standard Confirmation of Sale, His Failure to so Notify Appellants Justifies Recovery Against Crane.

For the sake of argument, if the contract called for such a Standard Confirmation of Sale form, Crane was obviously under a duty to so inform appellants. When Crane received the Standard Memorandum of Sale, he was duty bound to notify Margules that such Memorandum would not be satisfactory, and that a Standard Confirmation of Sale would be required.

7 U. S. C. A., Section 499b(4) declares it to be unlawful for a broker "to fail, without reasonable cause, to perform any specification of duty, express or implied, arising out of any undertaking in connection with any such transaction."

Crane argues that he cannot be held liable for such breach of duty because the complaint before the Department of Agriculture did not set up a cause of action in fraud and misrepresentation. Crane supports this argument with citation of cases involving *actual fraud*.

While 7 U. S. C. A., Section 499b(4) declares that the broker is liable for false statements made "for a fraudulent purpose," the element of fraud is not mentioned with respect to the liability of a broker to perform a duty, expressed or implied. This was not a case of actual fraud, but one of constructive fraud. Under *California Civil Code*, Section 1573, constructive fraud consists of "any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud." Constructive fraud exists even where material statements are made without a fraudulent intention to deceive.

Hayter v. Fulmor, 92 Cal. App. 2d 393, 398, 206 P. 2d 110.

It would have been impossible for appellants to plead a failure of performance of duty arising out of Crane's failure to notify appellants that he desired a Standard Confirmation of Sale form. Such contention was unknown to appellants until July 12th, 1950, when during the course of the trial *de novo*, such contention was made for the first time!

Pleadings before the Secretary of Agriculture are liberally construed. The Secretary has repeatedly held that recovery will not be denied if the facts proved show a violation of the Perishable Agricultural Commodities Act even though the complaint fails specifically to charge the precise violation.

Southern Brokerage Co., 3 A. D. 892;

Gilinsky Fruit Co., P. A. C. A., S. 1195;

Quality Produce Co., P. A. C. A., S. 741;

Farm Bureau Fruit Produce Co., 9 A. D. 1347;

Joe Perone, 8 A. D. 1050.

VI.

If Crane Is Liable in This Case, It Is Not Upon the Theory of Kazanjian's Breach, but Because of His Own False Misrepresentations and Breach of Duty as a Broker.

The arguments made on pages 29 to 33 of Crane's brief to the effect that he is not liable for the breach of Kazanjian because Kazanjian was not an undisclosed principal, is not directed to any of the issues of this case. Appellants have made no such contention.

If Kazanjian did not breach the contract, Crane is liable because of falsely representing that Kazanjian had confirmed the sale, and for failing to notify appellants that the Standard Memorandum of Sale was not acceptable.

Conclusion.

In our opening brief, we urged that the written documents by themselves establish the existence of a binding contract and reveal the breach of that contract by Kazanjian. Crane's brief merely spotlights the many inconsistencies and incongruities of the District Court decision.

This relatively simple case has been rendered confusing by a multitude of defenses, some of which found acceptance by the District Court despite lack of evidentiary support, despite lack of reason, and despite the fact that the contract was complete and unambiguous.

We respectfully pray that the decision of the District Court be reversed.

Respectfully submitted,

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ADELE WALSH,

Attorneys for Appellants.

No. 12884.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CENTRAL FRUIT & VEGETABLE COMPANY and WEST
TEXAS PRODUCE COMPANY,

Appellants,

vs.

ASSOCIATED FRUIT DISTRIBUTORS OF CALIFORNIA, RAY-
MOND M. CRANE, RED LION PACKING COMPANY, and
JOHN C. KAZANJIAN,

Appellees.

PETITION FOR REHEARING.

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MOND M. CRANE, RED LION PACKING COMPANY, and
JOHN C. KAZANJIAN,

Appellees.

PETITION FOR REHEARING.

*To the Honorable Judges of the United States Court of
Appeals for the Ninth Circuit:*

A rehearing is requested upon the following grounds:

1. Appellants' right to relief against Crane was not waived by a failure to appeal from the order of the Secretary of Agriculture dismissing as to Crane, the appeal by Kazanjian from such order having reinstituted the entire proceeding as an original proceeding in the District Court as an original proceeding—involving all parties and all issues.

2. The telegrams of October 3, 1944, and October 4, 1944, which are quoted in the opinion of the court are of clear, plain and unambiguous language, the meaning of which should not have been varied by the interpretation given to same by the court.

3. The opinion of the court reflects a failure to give effect to the controlling difference between this case and that of *Joseph Denunzio Fruit Co. v. Crane*, 79 Fed. Supp. 117.

Appellants Cannot Be Held to Have Acquiesced in the Order Dismissing as to Crane.

The facts of this case are such that, if the decision of the court dismissing appellants' complaint against Kazanjian is sound, it is inescapable that Crane is liable to appellants. This court, however, has denied such relief by a *sua sponte* determination that appellants had waived their rights against Crane by failing to appeal from the order of the Secretary of Agriculture which dismissed as to Crane. It is unfortunate perhaps that Crane did not urge such waiver as a defense, for in such event, the law thereon would have been briefed and submitted to the court, clearly establishing that no such waiver had taken place.

While there appear to be no cases under the Perishable Agricultural Commodities Act involving the precise question, Paragraph (c) of Section 7 of such act (7 U. S. C. A., Sec. 499g(c)) has been construed as providing for a trial *de novo*, to wit:

“* * * a trial anew of the entire controversy, including the hearing of evidence as though no previous action had been taken.”

Spano v. Western Fruit Growers, Inc. (C. C. A. 10), 83 F. 2d 150, 152.

Particularly explanatory of the law governing an appeal by trial *de novo* from an administrative order is the early United States Supreme Court decision of *Grisar v. McDowell*, 6 Wall. 363, 73 U. S. 863, wherein the Su-

preme Court cautioned that in this type of an appeal one should not be misled by the term "appeal," for, in effect, it is more of a transfer of jurisdiction than an appeal. That case involved conflicting claims of the United States Government and the City of San Francisco to certain land allotments. Both parties appealed from a decision of a federal board of land commissioners, thus giving rise to a trial *de novo* in the District Court. Prior to trial in the District Court, the United States had dismissed its appeal. The Supreme Court held that, despite such dismissal, the United States was not precluded from urging every right and contention that was available to it before the administrative board.

Analogy is to be found, also, in *de novo* proceedings which follow an appeal from admiralty decisions of the District Court. Our Supreme Court, in the case of *Standard Oil Co. of New Jersey v. Southern Pacific Company*, 45 S. Ct. 465, 467, 268 U. S. 146, 69 L. Ed. 890, said:

"On appeal in admiralty, there is a trial *de novo*. The whole case was opened in the Circuit Court of Appeals by the appeal of the Southern Pacific Company, *as much as it would have been if the Director General had also appealed.*" (Emphasis supplied.)

In *Reid v. Fargo*, 241 U. S. 544, 36 S. Ct. 712, the Supreme Court held that on the *de novo* appeal in admiralty, recovery may be had against a party who was dismissed by virtue of a decree which was not appealed from.

Where an admiralty decree denied the libel as to one claim, but sustained it as to another, an appeal required hearing *de novo* the decree of the court as to both claims.

The John Twohy, 255 U. S. 77, 41 S. Ct. 251.

The Court's Commentary and Interpretation of the October 3 and 4 Telegrams Cannot Be Justified.

Neither the Secretary of Agriculture, the District Court, the parties to this proceeding, nor even this court, has determined or contended that the telegrams of October 3, 1944, and October 4, 1944, quoted in the court's opinion, are ambiguous or uncertain. Without intending disrespect for this court, in our opinion, any ambiguity that now remains is to be found not in the language of the parties, but in the court's commentary thereon. For Crane to have said to Kazanjian "HAVE SOLD FOR YOUR ACCOUNT," is plain, and unambiguous. For the court to interpret such language as meaning that "subject to confirmation, Crane, for Kazanjian's account, had made contracts with buyers (not named or identified), whereby the buyers had contracted to buy from Kazanjian and Crane, for Kazanjian's account, had contracted to sell to the buyers," is either a more elaborate way of saying that Crane had sold for Kazanjian's account, or it is a completely ambiguous restatement of an otherwise simple and succinct statement. When Kazanjian, on October 4, 1944, replied, "FIFTEEN CARS STORAGE US ONE EMPERORS DECEMBER 10TH CONVERSION SATISFACTORY," he was clearly and unambiguously stating that he was satisfied by the sale which Crane had reported to him in his October 3, 1944, telegram respecting 15 cars of grapes. For the court then to paraphrase this language and to hold that by it, it was intended by both Crane and Kazanjian to mean that Kazanjian "was still willing to make con-

tracts with buyers (not named or identified), whereby the buyers would contract to buy from Kazanjian, and Kazanjian would contract to sell to the buyers," is clearly a conversion of simple clarity into compound ambiguity.

That neither Crane nor Kazanjian understood these telegrams within the interpretation ascribed to them by this court is clear from the *very first communication* thereafter by Crane when, on October 10, 1944, he wired Margules, "SHIPPER REDLION TAKES VIEW ACCOUNT CEILING LIFTED ANY CONTRACTS EMPERORS VOIDED." [Tr. p. 481.] He didn't say that he or Kazanjian had failed to consummate the sale to appellants. He said that Kazanjian, his principal, felt that the lifting of the ceiling prices had the effect of *voidiing such contracts*. Again, on October 16, in the *last communication* of the parties to this proceeding, Crane wired to Margules "AGAIN TALKED REDLION. THEY STATE DEFINITELY UNWILLING ABIDE ANY SALES MADE WHERE CEILING DEFINITE CONSIDERATION." [Tr. p. 482.] Here again Crane belies the Court's interpretation by written proof of his principal's instructions, disclosing both Crane's and Kazanjian's intention that, despite the SALES ALREADY MADE, the ceiling price having been a definite consideration, the seller refused to abide by his contract.

We are morally certain that this court did not intend to abet Kazanjian's violation of the integrity of his contract, and yet, it should be clear to the court that its unrealistic interpretation modifying the plain intent of unambiguous language accomplishes no other result.

There can be no justification for this court's ruling that the district court finding that Kazanjian did not contract to sell any grapes to appellant, was not clearly erroneous. Rule 52(a) of the Federal Rules of Civil Procedure cited by the court, provides that *findings of fact* shall not be set aside unless clearly erroneous. That Kazanjian had not contracted to sell grapes to appellants, was in this instance a conclusion to be drawn from the specific fact findings and not in itself a finding of fact. As we have pointed out in our briefs in this case, the only findings of the District Court which are supported by competent and credible evidence permit but one conclusion, to wit: a sale of grapes to appellants by Kazanjian through Crane, as a broker. Rationality and common sense establish but one reason for the failure to deliver, the only reason which appellees themselves expressed prior to the heat of litigation, to wit: the removal of ceiling prices. In determining what is "clearly erroneous," the established test is that the reviewing court on the entire record be left with the definite and firm conviction that a mistake has been committed. (*United States v. U. S. Gypsum Co.*, 333 U. S. 364, 395, 68 S. Ct. 525.) Reviewing the record of this case, we cannot perceive how one can avoid the definite and firm conviction that the seller reneged on his contract by virtue of a change in price structure. A conclusion to the contrary requires abandonment of the plain interpretation of written communications and a resort to a selection from the tenuous, contradictory and unreasonable defenses of the defaulter.

The Court's Opinion Reveals a Failure to Distinguish the Denunzio Case From the Instant Case.

The *Denunzio* case was tried upon a different theory than the instant case. The court's lengthy footnote on the *Denunzio* case, and its notice that the Secretary, Judge O'Connor, Judge Carter and the Court of Appeals had agreed that Denunzio was not entitled to recover damages of Kazanjian, makes clear to us that unfortunately the court has failed to note the vital distinction between the two cases. It must be noted that the instant case was tried by the Secretary of Agriculture after and not before the Secretary's decision in the *Denunzio* case. The Secretary notes that there are distinguishing facts in the two cases. [Tr. p. 59.] Being the later decision, the Secretary's decision in this case was more advised and more informed than his decision in the *Denunzio* case. It appears from the opinion of the Secretary of Agriculture in the *Denunzio* case that there was not before him or that he had not noted the existence of the telegram of October 4, 1944, whereby Kazanjian had definitely ratified the sale. Having no evidence before him to bind Kazanjian as a principal, the Secretary was compelled in the *Denunzio* case to hold that the agent who apparently had acted without authorization of his principal, was the party liable. In our case, however, it was clear to the Secretary that Kazanjian ratified the sale in writing on October 4, 1944. In the District Court, Denunzio elected to hold the agent liable on the theory that where the principal is undisclosed, either principal or agent may be held

liable. To the extent that the *Denunzio* case justifies a decision against Crane as distinguished from Kazanjian, it is not effective authority in the instant case. We are confident that a re-examination and rehearing by the court will disentangle any confusion now existing as to the proper application of the law of the *Denunzio* decision to the issues of the instant case.

Conclusion.

That portion of the court's opinion which attributes waiver to a failure to appeal from an administrative order already appealed from was neither argued nor briefed before the court. It is a determination of grave consequence, since it involves a radical departure from the established practice governing such appeals. It creates an issue which should be most carefully re-examined and reconsidered by the court, with full opportunity afforded to counsel to brief and argue the same.

That portion of the court's opinion which reinterprets and varies the common acceptation of plain and unambiguous language, is likewise of grave consequence, requiring the court's studied re-examination and reconsideration. Few principles of law have been as definitely established as that which holds that it is for the parties to make a contract, and not for the courts to modify the clearly expressed intent of the parties.

That portion of the court's opinion which indicates that the *Denunzio* decision is a precedent to be followed in this case, and which misconceives the underlying distinction between the two cases, also demands thorough re-examination and reconsideration.

We are confident that the court's purpose to accomplish justice and avoid error, is no less fixed than our

adamant determination not to yield to error. We, therefore, urgently and respectfully petition for a rehearing of the issues of this case.

Respectfully submitted,

HARRY A. PINES,
ADELE WALSH, and
J. MANUEL HOPPENSTEIN,

By HARRY A. PINES,
Attorneys for Appellants.

Certification.

I, Harry A. Pines, an attorney regularly admitted to practice in the United States Court of Appeals for the Ninth Circuit, do certify that in my opinion, the foregoing petition for rehearing in the case of Central Fruit & Vegetable Co., *et al.*, appellants, vs. Associated Fruit Distributors of California, *et al.*, appellees, is well founded and that it is not presented for the purpose of creating delay.

HARRY A. PINES.

No. 12884.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CENTRAL FRUIT & VEGETABLE Co., and WEST TEXAS
PRODUCE COMPANY,

Appellants,

vs.

ASSOCIATED FRUIT DISTRIBUTORS OF CALIFORNIA, RAY-
MOND M. CRANE, RED LYON PACKING COMPANY, and
JOHN C. KAZANJIAN,

Appellees.

PETITION FOR REHEARING.

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JOHN C. KAZANJIAN,

Appellees.

PETITION FOR REHEARING.

*To the Honorable Judges of the United States Court of
Appeals for the Ninth Circuit:*

Although the decision of this Court, filed February 27, 1952, vacates the judgment of the District Court from which this appeal was taken, we believe that our responsibility as officers of the court compels us to direct attention to probable error in the reason assigned by the Court for its decision.

The opinion of the Court is based upon the conclusion that the order of Thomas J. Flavin, Judicial Officer for the Secretary of Agriculture, was not an appealable order. The Court conceded that if the order had been made by the Secretary of Agriculture, it would have been appealable to the District Court.

The opinion of the Court overlooks the existence of the *Act of April 4, 1940*, c. 75, Sections 1 to 3, inclusive, 54 Stat. 81, 5 U. S. C. A. 516a-516c,* which vests the Secretary of Agriculture with authority to delegate his regulatory functions to any officer designated by said Act. The Act includes within regulatory functions of the Secretary the issuance or promulgation of regulatory orders, which by definition of the statute, embraces awards such as the award of reparation damages in the instant case.

Pursuant to the authority vested in him by the *Act of April 4, 1940*, the Honorable Clinton P. Anderson, as Secretary of Agriculture, on November 7, 1945, made an order designating Thomas J. Flavin, Assistant to the Secretary, as Judicial Officer, with authority to perform any regulatory function defined in the *Act of April 4, 1940*. This delegation of authority was published in the Federal Register on November 9, 1945, and appears in *Volume 10, Federal Register*, page 13769.*

The Federal Register Act requires that judicial notice be taken of the contents of the Federal Register, 44 U. S. C. A. 307.*

The courts of appeal have judicially noticed the contents of the Federal Register.

Kempe v. United States (8th Cir.), 151 F. 2d 680;
Green v. United States (1st Cir.), 176 F. 2d 541;
United States ex rel. Brown v. Lederer (7th Circuit), 140 F. 2d 136.

In the case of *Kiyoichi Fujikawa, et al. v. Sunrise Soda Water Works Co., et al.*, 158 F. 2d 490 at page 493, this

*See appendix hereto for pertinent text.

Court recognized that it may take judicial notice of executive orders which are published in the Federal Register.

Had the question of the authority of Thomas J. Flavin been raised by appellees as an issue of this case, we would have included in our briefs the basis for such authority. The Court may recall that at the oral argument, when the question of Mr. Flavin's authority was raised *sua sponte* by Circuit Judge Mathews, counsel for appellees unequivocally conceded the authority of the Judicial Officer. We regret that we did not anticipate that such question might be posed, thus possibly enabling us to assist in averting what we respectfully believe to be error in the Court's opinion.

Although the effect of the opinion vacating the decision of the District Court is not such as to constitute us as aggrieved thereby, we believe that it should be set aside to avoid creating doubt as to the validity of numerous orders that have been signed by the Judicial Officer of the Secretary of Agriculture.

Wherefore, petitioner respectfully prays that a rehearing be granted, and that thereupon, the judgment of the District Court be reversed with directions to enter judgment for appellants, and for such further relief as this Court may deem proper.

Respectfully submitted,

HARRY A. PINES,
ADELE WALSH, and
J. MANUEL HOPPENSTEIN,
By HARRY A. PINES,

Attorneys for Appellants.

Certification.

I, Harry A. Pines, an attorney regularly admitted to practice in the United States Court of Appeals for the Ninth Circuit, do certify that in my opinion, the foregoing petition for rehearing in the case of Central Fruit & Vegetable Co., *et al.*, appellants, vs. Associated Fruit Distributors of California, *et al.*, appellees, is well founded and that it is not presented for the purpose of creating delay.

HARRY A. PINES.

APPENDIX.

Title 5, U. S. C. A.:

Section 516a. Delegation of regulatory functions of Secretary of Agriculture: definitions.

As used in sections 516a-516e of this title—

(a) The term “regulatory order” means an order, marketing agreement, standard, permit, license, registration, suspension or revocation of a permit, license, or registration, certificate, award, rule, or regulation, if it has the force and effect of law, and if it may be made, prescribed, issued, or promulgated only after notice and hearing or opportunity for hearing have been given.

(b) The term “regulatory function” means the making, prescribing, issuing, or promulgating, of a regulatory order; and includes (1) determining whether such making, prescribing, issuing, or promulgating is authorized or required by law, and (2) any action which is required or authorized to be performed before, after, or in connection with, such determining, making, prescribing, issuing, or promulgating. Apr. 4, 1940, c. 75, Section 1, 54 Stat. 81.

Section 516b. Delegation of regulatory functions to designated employees; status of employees; number; revocation of delegation.

Whenever the Secretary of Agriculture deems that the delegation of the whole or any part of any regulatory function which the Secretary is, now or hereafter, required or authorized to perform will result in the more expeditious discharge of the duties of the Department of Agriculture, he is authorized to make such delegation to any officer or employee designated under this section. The Secretary is

authorized to designate officers or employees of the Department to whom functions may be delegated under this section, and to assign appropriate titles to such officers or employees. The position held by any officer or employee while he is designated under this section, and vested with a regulatory function or part thereof delegated under this section, shall be allocated to a grade, not lower than grade 7, in the professional and scientific service provided for by sections 661-663, 664-669, 670-672, 673 and 674 of this title, or to a grade, not lower than grade 14, in the clerical, administrative, and fiscal service provided for by such sections. There shall not be in the Department at any one time more than two officers or employees designated under this section and vested with a regulatory function or part thereof delegated under this section. The Secretary may at any time revoke the whole or any part of a delegation or designation made by him under this section. Apr. 4, 1940, c. 75, Sec. 2, 54 Stat. 81.

Section 516c. Authority of designated employees; retroactive revocation of delegation

Whenever a delegation is made under section 516b of this title, all provisions of law shall be construed as if the regulatory function or the part thereof delegated had (to the extent of the delegation) been vested by law in the individual to whom the delegation is made, instead of in the Secretary of Agriculture. A revocation of delegation shall not be retroactive, and each regulatory function or part thereof performed (within the scope of the delegation) by such individual prior to the revocation shall be considered as having been performed by the Secretary. Apr. 4, 1940, c. 75, Section 3, 54 Stat. 82.

Title 44, U. S. C. A.:

Section 307.

* * * The publication in the Federal Register of any document shall create a rebuttable presumption (a) that it was duly issued, prescribed, or promulgated; (b) that it was duly filed with the Division and made available for public inspection at the day and hour stated in the printed notation; (c) that the copy contained in the Federal Register is a true copy of the original; and, (d) that all requirements of this chapter and the regulations prescribed hereunder relative to such document have been complied with. The contents of the Federal Register shall be judicially noticed and, without prejudice to any other mode of citation, may be cited by volume and page number. (July 26, 1935, c. 417, Section 7, 49 Stat. 502.)

10 Federal Register, page 13769:

1. Pursuant to the provisions of the act approved April 4, 1940 (54 Stat. 81; 5 U. S. C. 516a-516e), Thomas J. Flavin, Assistant to the Secretary, is designated as Judicial Officer and is authorized to perform any regulatory function as defined in the said act of April 4, 1940, which the Secretary of Agriculture is or hereafter may be authorized or required by law to perform.

2. The provisions of this order shall not affect the authority of the Secretary of Agriculture to perform any regulatory function, and shall not affect the authority of the Under Secretary or of the Assistant Secretary of Agriculture, by virtue of any delegation of authority heretofore or hereafter made, to perform such function.

3. The provisions of this order shall not be construed to limit the authority of Thomas J. Flavin to perform any functions, in addition to those defined in said act of April 4, 1940, which from time to time may be assigned by the Secretary to him.

4. The orders issued on April 3, 1942 (7 F. R. 2656) and June 12, 1943 (8 F. R. 8087), delegating to the said Thomas J. Flavin authority to perform regulatory functions are hereby revoked.

Done at Washington, D. C., this 7th day of November, 1945.

CLINTON P. ANDERSON,
Secretary of Agriculture.

(SEAL)

(F. R. Doc. 45-20493; Filed Nov. 8, 1945; 11:14 A.M.)

No. 12892

United States
Court of Appeals
for the Ninth Circuit.

SIGNAL MANUFACTURING COMPANY and
CHARLES SCHNEIDER,

Appellants,

vs.

THE KILGORE MANUFACTURING COM-
PANY, a Corporation,

Appellee.

Transcript of Record
In Two Volumes
Volume I
(Pages 1 to 190)

Appeal from the United States District Court,
Southern District of California,
Central Division.

No. 12892

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SIGNAL MANUFACTURING COMPANY and
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Appeal from the United States District Court,
Southern District of California,
Central Division.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Suite, 510, 811 West Seventh St.,
Los Angeles 17, Calif.

WARREN H. F. SCHMIEDING,
50 West Broad St.,
Columbus, Ohio.

In the United States District Court, Southern
District of California, Central Division

Civil Action No. 7693B

THE KILGORE MANUFACTURING COM-
PANY, a Corporation,

Plaintiff,

vs.

SIGNAL MANUFACTURING COMPANY, a
Corporation,

Defendant.

BILL OF COMPLAINT

Now comes The Kilgore Manufacturing Com-
pany, plaintiff in the above-entitled action, and
complains of Signal Manufacturing Company, de-
fendant herein, and for cause of action alleges:

I.

That plaintiff, The Kilgore Manufacturing Com-
pany, is a corporation organized and existing under
the laws of the State of Ohio, having its principal
place of business at Westerville, in the County of
Franklin and State of Ohio:

II.

That defendant, Signal Manufacturing Company,
is a corporation organized and existing under the
laws of the State of California, and has a regular
and established place of business [2*] at 524 West
Pico Street, in the City of Los Angeles, County of
Los Angeles and State of California, of which place

*Page numbering appearing at foot of page of original Certified
Transcript of Record.

in the Southern District of California, Central Division, among others, the acts hereinafter complained of as infringements and other unlawful acts have been done and are being done by the said defendant.

III.

That the jurisdiction of this Court arises under and by reason of the patent laws of the United States, and the diversity of citizenship of the parties in suit where the amount in controversy exceeds the sum of Three Thousand (\$3,000.00) Dollars, exclusive of interest and costs.

IV.

On February 20, 1934, United States Letters Patent No. 1,947,834 were duly and legally issued to Louis L. Driggs, Jr., and Henry B. Faber for an invention in Flare Signal, and thereafter by assignments in writing recorded in the Records of Transfer of the United States Patent Office, in Liber E209, Pages 263 and 267, plaintiff herein The Kilgore Manufacturing Company, is the owner of the entire right, title and interest in and to said Letters Patent No. 1,947,834 and the invention described and claimed therein, and has the right to collect for past infringement thereof. A copy of said Letters Patent No. 1,947,834 is attached hereto and marked "Plaintiff's Exhibit 1."

V.

Defendant, Signal Manufacturing Company, has for a long time past and still is infringing said Letters Patent No. 1,947,834 by manufacturing, using

and selling flare signals embodying the invention patented in said Letters Patent, and will continue to do so unless enjoined by this Court. A sample of one of the devices manufactured and sold by defendant is filed herewith and marked "Plaintiff's Exhibit 2." [3]

VI.

Defendant is equipped to manufacture flare signals like plaintiff's Exhibit 2 in substantial quantities, and threatens to continue to manufacture, use and sell said flare signals, and in so manufacturing to practice the patented invention.

VII.

Plaintiff has for a long time past and still is manufacturing flare signals embodying the invention patented in plaintiff's Letters Patent No. 1,947,834 and has placed the required statutory notice on the flare signals that it manufactures, and defendant has had actual notice of said Letters Patent.

For a Second Cause of Action

VIII.

Plaintiff repeats and realleges as a part of this cause of action each and all of the allegations contained in Paragraphs Nos. I to VII of the First Cause of Action, with like effect as if herein fully realleged, and incorporates herein all the facts therein set forth.

IX.

Plaintiff has been engaged in the manufacture and sale of flare signals for many years and has

specialized throughout said years in the manufacture of a unique type flare signal embodying and containing not only the improvements disclosed in Letters Patent No. 1,947,834 aforesaid, but also embodying and containing certain non-functional features of design and style which, in association with the improvements attained by practicing the invention disclosed in said Letters Patent, give plaintiff's flare signals a characteristic of unique eye appearance, well known to the trade throughout the United States and foreign [4] countries, and this uniqueness of design is indicative of the product of the said plaintiff.

X.

Plaintiff established a very large and profitable business in flare signals having non-functional features of design and style, has spent large sums of money in promoting the use of and in advertising said flare signals embodying said non-functional features of design and style, and has maintained a quality product which is so recognized by the trade; that by reason of the quality of the product sold by plaintiff with said non-functional features, an enormous good will and business reputation of high value has been built and recognized by the trade in the products manufactured by plaintiff; that by reason of the large business of said plaintiff, its extensive promotion and advertising in the manufacture and sale of flare signals having the said characteristic eye appearance, said feature in said flares acquired a secondary meaning in the trade, in the United States and foreign countries, and when in-

incorporated in flares, is indicative of flare signals manufactured and distributed by the plaintiff or in some way backed by the reputation and good will of the plaintiff.

XI.

That defendant, well knowing the facts hereinbefore set forth, adopted not only the invention patented by said Letters Patent No. 1,947,834, but adopted all of the non-functional features of plaintiff.

XII.

That the flare signals manufactured by defendant, although simulating the flare signals manufactured by plaintiff, nevertheless are of inferior workmanship and quality. [5]

XIII.

That plaintiff has for many years enjoyed the exclusive use of the non-functional features, design and style of its flare signals and the trade and public have recognized, acknowledged, acquiesced in said rights therein; that by reason of the premises, the use by defendant of these simulating features will result in embarrassment, annoyance, financial injury and damage to the plaintiff, of its established rights in said non-functional features, design and style, and will cause confusion in the trade, unless enjoined by this Court.

XIV.

That the acts complained of as aforesaid constitute unfair competition, unfair methods of competition in trade, illegal appropriation of plaintiff's property, and are accordingly unlawful.

Wherefore, plaintiff prays:

1. That a preliminary and final injunction issue against further infringement of said Letters Patent No. 1,947,834 by defendant and those controlled by defendant.

2. That defendant, its agents, officers, servants, employees, and those acting in concert therewith, be enjoined during the pendency of this action and permanently thereafter from the following:

(a) Practicing the invention of said Letters Patent No. 1,947,834;

(b) Making, using, selling, appropriating or causing the appropriation of flare signals embodying the non-functional features of the flare signals of plaintiff so as to prevent the flare signals manufactured and sold by defendant [6] from simulating the eye appearance of the flare signals manufactured and distributed by plaintiff;

(c) Doing any act or thing that would enable defendant to substitute the flare signals of its manufacture for the flare signals manufactured by plaintiff; and

(d) Unfairly competing with the plaintiff in any manner whatsoever.

3. That the defendant be required to pay to plaintiff such damages as plaintiff has sustained in consequence of defendant's infringement and/or by reason of the unlawful acts of defendant and to account and pay over to plaintiff all of the gains, profits and advantages derived by defendant from its infringements and an increase of such damages

as provided by law, and an assessment of costs of this action against defendant.

4. That defendant be required to deliver to the Marshal, to be impounded during the pendency of this action, all flare signals which have the eye appearance of the flare signals of plaintiff and to deliver to the Marshal, to be impounded during the pendency of this action, all copies in its possession or under its control of literature or advertising material illustrating or in any way describing flare signals having the eye appearance of those of plaintiff.

5. That plaintiff have such other and further relief as is just.

Los Angeles, California, October 15, 1947.

THE KILGORE MANUFACTURING COMPANY,

By /s/ WARREN H. F. SCHMIEDING,
Attorney for Plaintiff.

/s/ HAROLD W. MATTINGLY,
Attorney for Plaintiff.

/s/ WAYNE S. GERBER,
Of Counsel.

[Endorsed]: Filed Oct. 16, 1947. [7]

[Plaintiff's Exhibit No. 1, Patent No. 1,947,834—L. L. Driggs, Jr., is contained in Vol II, Book of Exhibits, page 191.]

[Title of District Court and Cause.]

ANSWER

Now comes the defendant, Signal Manufacturing Company, and in answer to the Bill of Complaint filed herein, admits, denies and alleges as follows:

I.

The defendant is without knowledge as to the allegations of Paragraph I, except as alleged therein, and therefore denies the same and leaves plaintiff to strict proof thereof.

II.

The defendant admits that it is a corporation organized and existing under the laws of the State of California, and has a regular and established place of business at 524 West Pico Boulevard, in the City of Los Angeles, County of Los Angeles, [15] and State of California, in the Southern District of California, Central Division, but denies that it has at that or any other place committed acts of infringement or other unlawful acts.

III.

Defendant admits that the jurisdiction of this Court as to the alleged causes of action set forth in the complaint arises under and by reason of the patent laws of the United States and the diversity of citizenship of the parties, but denies that the amount in controversy exceeds the sum of Three Thousand (\$3,000.00) Dollars, exclusive of interest and costs.

IV.

In answer to Paragraph IV, the defendant admits that a purported patent No. 1,947,834 was issued to Louis L. Driggs, Jr., and Henry B. Faber; denies that said patent covered any patentable invention in Flare Signal or otherwise; defendant is without knowledge of the remaining allegations of said Paragraph and therefore denies same.

V.

Defendant denies that it has for a long time past or still is infringing said Letters Patent No. 1,947,834 by manufacturing, using or selling flare signals embodying the invention patented in said Letters Patent, or will continue to do so unless enjoined by this Court.

VI.

Defendant admits it is equipped to manufacture flare signals like plaintiff's Exhibit 2 in substantial quantities, and intends to continue to manufacture and sell but not use said flare signals, but denies that in so doing it is practicing a patentable invention. [16]

VII.

Defendant admits receipt of a notice in writing alleging that it has infringed said Letters Patent, but defendant is without knowledge as to the remaining allegations of said paragraph and hence denies the same.

VIII.

For a Further, Separate and Affirmative Defense, defendant alleges that said Letters Patent

No. 1,947,834, and particularly claims 1 to 11, inclusive, and 15 and 16 thereof, which claims have been designated by plaintiff in a written notice dated November 18, 1947, as the claims upon which it will rely, is invalid and of no effect in law:

(a) because the alleged inventions and improvements and all material and substantial parts thereof set forth and claimed in said pretended Letters Patent No. 1,947,834 have been patented and described in the following patents and printed publications prior to the supposed invention or discovery thereof by said Louis L. Driggs, Jr., and Henry B. Faber:

Prior Patents and Printed Publications

Detewiller	79,963	7/14/1868
Amici	41,173	1/ 5/1864
Wood	132,227	10/15/1872
Leet et al.....	208,247	9/24/1878
Bogardus	216,552	6/17/1879
Piffard	383,984	6/ 5/1888
Ulrich	777,319	12/13/1904
Murphy	987,590	3/21/1911
Sweeley	1,073,940	9/23/1913
Roger	1,216,364	2/20/1917
Bergman	1,318,719	10/14/1919
Paulus et al.	1,641,549	9/ 6/1927
Driggs et al.	1,712,382	5/ 7/1929
Driggs et al.	1,712,383	5/ 7/1929
Faber et al.	1,785,770	12/23/1930
Rollet (French)	496,832	11/18/1919

Wilder (British)	128,976	7/10/1919
Pain (British)	7,363	11/29/1917
Brandon (British)	2,257	1869
Hookham (British)	22,081	10/28/1893
Chamberlin (British)	21,266	10/ 5/1892
Roth (German)	288,654	4/22/1920
Military Pyrotechnics, Faber		1919

Vol. 2, pages 150-156.

and by other patents and printed publications which are not at present known to this defendant but which this defendant requests it be allowed to insert by amendment when ascertained;

(b) because the alleged invention set forth in said Letters Patent No. 1,947,834 was not novel and patentable when alleged to have been produced by said Louis L. Driggs, Jr., and Henry B. Faber, but that said Flare Signal described and claimed in said Letters Patent, and particularly the claims thereof here relied on by plaintiff, namely, claims 1 to 11, inclusive, 15 and 16, had been known to others in this country prior to the alleged invention thereof by said Louis L. Driggs, Jr., and Henry B. Faber, and particularly by the patentees and persons specified in subdivision (a) hereof;

(c) because the specification and claims of said Letters Patent No. 1,947,834, and particularly claims 1 to 11, inclusive, 15 and 16 thereof, describe and claim a Flare Signal devoid of any patentable invention in that said specification and [18] claims merely disclose a Flare Signal which anyone skilled in the art to which it pertains would be capable of

and expected to produce in the exercise of the ordinary skill of his calling;

(d) because the specification and claims of said Letters Patent No. 1,947,834 and particularly claims 1 to 11, inclusive, 15 and 16 thereof, describe and claim mere aggregations of a number of old parts or elements which, in the claimed aggregations, perform or produce no new or different functions or operations than that theretofore performed or produced by them, and hence do not amount to patentable invention;

(e) because the specification and claims of said Letters Patent No. 1,947,834 and particularly claims 1 to 11, inclusive, 15 and 16 thereof, describe and claim more than was actually invented by said Louis L. Driggs, Jr., and Henry B. Faber, if in fact and in law any invention was made by them.

IX.

For a Further, Separate and Affirmative Defense, defendant alleges that the inventors and their alleged assignee, plaintiff herein, in prosecuting the application for said patent in the United States Patent Office either voluntarily, or in response to Patent Office action, so limited the claims of said patent, and particularly claims 1 to 11, inclusive, 15 and 16 thereof, that said plaintiff is now estopped from claiming that any of the claims of said patent have sufficient breadth to include any signal flares manufactured, used or sold by this defendant.

As and for its answer to the alleged Second Cause of Action asserted in the complaint on file

herein, defendant admits, denies and alleges as follows: [19]

X.

Defendant repeats its above-stated answers to Paragraphs IV to VII, inclusive, of the complaint and incorporates the same by reference as though specifically set forth herein.

XI.

Defendant denies the allegations of Paragraph IX of the complaint.

XII.

Defendant denies the allegations of Paragraph X of the complaint.

XIII.

Defendant denies the allegations of Paragraph XI of the complaint.

XIV.

Defendant denies the allegations of Paragraph XII of the complaint, and alleges the facts to be that the signal flares of its manufacture have approval of the United States Coast Guard and are equal in quality and workmanship to flares of like category produced by plaintiff herein.

XV.

Defendant denies the allegations of Paragraph XIII of the complaint.

XVI.

Defendant denies the allegations of Paragraph XIV of the complaint.

XVII.

For a Further, Separate and Affirmative Defense to the alleged Second Cause of Action, defendant alleges that in making the accused signal flare it has utilized conventional shapes, materials, and the natural color of such materials as is [20] necessary in the production of devices inherently suited for the purpose for which they are intended, and that it has caused all such signal flares manufactured by it to be plainly marked with its name and address and the specific approval number assigned thereto by the United States Coast Guard.

Wherefore, this defendant prays that plaintiff take nothing by its complaint herein and that said complaint be dismissed as to defendant with costs and reasonable attorneys' fees.

SIGNAL MANUFACTURING
COMPANY,

By /s/ C. A. MIKETTA,
Its Attorney.

NAYLOR & LASSAGNE,
/s/ JAS. M. NAYLOR,
Attorneys for Defendant.

[Endorsed]: Filed Dec. 19, 1947. [21]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by the parties to the above-entitled action, through their attorneys, that statements made during the taking of testimony of the patentee L. L. Driggs, Jr., called by plaintiff in The Kilgore Manufacturing Co., et al., vs. Triumph Explosives, Inc., et al., case, in the United States District Court of Maryland in 1940, the decision being reported at 37 F. Supp. 766, said statements and testimony appearing in the copy delivered by defendant, Signal Manufacturing Company, to plaintiff's counsel on December 3, 1948, may be referred to, used and introduced in evidence by either party, subject to objection as to relevancy, competency and materiality.

Dated this 10th day of December, 1948.

/s/ **HAROLD W. MATTINGLY,**
Attorney for Plaintiff.

/s/ **C. A. MIKETTA,**
Attorney for Defendant.

[Endorsed]: Filed Dec. 13, 1948. [23]

[Title of District Court and Cause.]

ORDER ALLOWING FILING OF SECOND
AMENDED ANSWER AND COUNTER-
CLAIM

Good cause appearing and plaintiff Kilgore Manufacturing Company not objecting,

It Is Ordered: That the Second Amended Answer and Counterclaim of defendants Signal Manufacturing Company, a corporation, and Charles Schneider, doing business as Signal Manufacturing Company, heretofore lodged with the Clerk of this Court, on December 9, 1949, be and is hereby filed as of record in this cause.

/s/ C. A. MIKETTA,

/s/ W. W. GLENNY,

Attorneys for Defendants.

Approved:

/s/ WM. EDWARD HANN,

Attorney for Plaintiff.

So Ordered: Dec. 21, 1949.

/s/ WM. C. MATHES,

Judge, U. S. District Court.

[Endorsed]: Filed Dec. 21, 1949. [24]

[Title of District Court and Cause.]

SECOND AMENDED ANSWER
AND COUNTERCLAIM

Now come the defendants, Signal Manufacturing Company, a corporation, and Charles Schneider, doing business as Signal Manufacturing Company, and in their second amended answer to the Bill of Complaint filed herein, admit, deny and allege as follows:

I.

The defendants are without knowledge as to the allegations of Paragraph I, except as alleged therein, and therefore deny the same and leave plaintiff to strict proof thereof.

II.

The defendants admit that they are a corporation organized and existing under the laws of the State of California, and have a regular and established place of business at 4041 Whiteside [25] Street, in the City of Los Angeles, County of Los Angeles, and State of California, in the Southern District of California, Central Division, but deny that they have at that or any other place committed acts of infringement or other unlawful acts.

III.

Defendants admit that the jurisdiction of this Court as to the alleged causes of action set forth in the complaint arises under and by reason of the patent laws of the United States and the diversity

of citizenship of the parties, and admit that the amount in controversy exceeds the sum of Three Thousand Dollars (\$3,000.00), exclusive of interest and costs.

IV.

In answer to Paragraph IV, the defendants admit that a purported patent No. 1,947,834 was issued to Louis L. Driggs, Jr., and Henry B. Faber; deny that said patent covered any patentable invention in Flare Signal or otherwise; defendants are without knowledge of the remaining allegations of said Paragraph and therefore deny same.

V.

Defendants deny that they have for a long time past, or at any time, or still are infringing said Letters Patent No. 1,947,834 by manufacturing, using or selling flare signals embodying the invention patented in said Letters Patent, or will continue to do so unless enjoined by this Court.

VI.

Defendants admit they are equipped to manufacture flare signals like plaintiff's Exhibit 2 in substantial quantities, and intend to continue to manufacture and sell but not use said flare signals, but deny that in so doing they are practicing a patentable invention. [26]

VII.

Defendants admit receipt of a notice in writing alleging that they have infringed said Letters Pat-

ent, but defendants are without knowledge as to the remaining allegations of said paragraph and hence deny the same.

VIII.

For a Further, Separate and Affirmative Defense, defendants allege that said Letters Patent No. 1,947,834 and particularly claims 1 to 11, inclusive, and 15 and 16 thereof, which claims have been designated by plaintiff in a written notice dated November 18, 1947, as the claims upon which it will rely, is invalid and of no effect in law:

(a) because the alleged inventions and improvements and all material and substantial parts thereof set forth and claimed in said pretended Letters Patent No. 1,947,834 have been patented and described in the following patents and printed publications prior to the supposed invention or discovery thereof by said Louis L. Driggs, Jr., and Henry B. Faber:

Prior Patents and Printed Publications

Amici	41,173	1/ 5/1864
Detewiller	79,963	7/14/1868
Powers	116,094	6/20/1871
Wood	132,227	10/15/1872
Bogardus	216,552	6/17/1879
Murphy	987,590	3/21/1911
Sweeley	1,073,940	9/23/1913
Castenholz	1,114,228	10/20/1914
Bergman	1,305,187	5/27/1919
Bergman	1,318,719	10/14/1919
Lucas	1,434,784	11/ 7/1922

North	1,481,622	1/22/1924
Wiley	1,602,601	10/12/1926
Paulus et al.....	1,641,549	9/ 6/1927
Driggs et al.....	1,712,382	5/ 7/1929
Driggs et al.....	1,712,383	5/ 7/1929
Driggs et al.....	1,754,986	4/15/1930
Driggs et al.....	1,776,755	9/23/1930
Faber et al.....	1,785,770	12/23/1930
Babbitt	1,943,292	1/16/1934
Rollet (French)	496,832	11/18/1919
Societe Aubin (French).	502,678	5/22/1920
Brandon (British)	2,257	7/24/1869
Pain (British)	7,363	11/29/1917
Wilder (British)	128,976	7/10/1919
Wilder (British)	130,202	7/31/1919

Military Pyrotechnics, Faber, Vol 2, pages 150-156 1919;

General Rules and Regulations for Vessel Inspection, August, 1943, page II, pages G9-G11, inc.;

Army Ordnance Pamphlet No. 2031 entitled "History of Military Pyrotechnics in World War" printed in 1920, pages 8-11, 15, 16, 18, 19, 20, 21 and plates 3a, 4a and 5a;

Handbook of Ordnance Data, dated November 15, 1918, Government Printing Office, pages 287-292, inc.;

Blueprint entitled "Very Star Cartridge, Mark I, 25 m/m" dated August 6, 1918;

Blueprint entitled "Very Parachute Cartridge, Mark I, 25 m/m" dated August 6, 1918.

and by other patents and printed publications which are not at present known to these defendants but which these defendants request they be allowed to insert by amendment when ascertained; [28]

(b) because the alleged invention set forth in said Letters Patent No. 1,947,834 was not novel and patentable when alleged to have been produced by said Louis L. Driggs, Jr., and Henry B. Faber, but that said Flare Signal described and claimed in said Letters Patent, and particularly the claims thereof here relied on by plaintiff, namely, claims 1 to 11, inclusive, 15 and 16, had been known to others in this country prior to the alleged invention thereof by said Louis L. Driggs, Jr., and Henry B. Faber and particularly by the patentees and persons specified in subdivision (a) hereof;

(c) because the specification and claims of said Letters Patent No. 1,947,834, and particularly claims 1 to 11, inclusive, 15 and 16 thereof, describe and claim a Flare Signal devoid of any patentable invention in that said specification and claims merely disclose a Flare Signal which anyone skilled in the art to which it pertains would be capable of and expected to produce in the exercise of the ordinary skill of his calling;

(d) because the specification and claims of said Letters Patent No. 1,947,834 and particularly claims 1 to 11, inclusive, 15 and 16 thereof, describe and

claim mere aggregations of a number of old parts or elements which, in the claimed aggregations, perform or produce no new or different functions or operations than that theretofore performed or produced by them, and hence do not amount to patentable invention;

(e) because the specification and claims of said Letters Patent No. 1,947,834 and particularly claims 1 to 11, inclusive, 15 and 16 thereof, describe and claim more than was actually invented by said Louis L. Driggs, Jr., and Henry B. Faber, if in fact and in law any invention was made by them. [29]

IX.

For a Further, Separate and Affirmative Defense, defendants allege that the patent in suit and each and every claim thereof is void and invalid because, for the purpose of deceiving the public, the description and specification filed by the patentees Driggs and Faber in the Patent Office was made to contain less than the whole truth relative to their alleged invention; and that alleged invention was not shown or described or defined by the claims of the patent in suit in such full, clear, concise and exact terms as to enable those skilled in the art to practice the alleged invention or to clearly and exactly distinguish what, if anything, was actually the invention of said Driggs and Faber.

X.

Defendants further allege that the patentees of the patent in suit surreptitiously or unjustly obtained a

patent for that which was in fact invented by another or others and failed and unreasonably neglected or delayed to file a disclaimer of subject matter which was not the invention of said Driggs and Faber.

XI.

Defendants further allege that the inventors and their alleged assignee, plaintiff herein, in prosecuting the application for said patent in the United States Patent Office either voluntarily, or in response to Patent Office action, so limited the claims of said patent, and particularly claims 1 to 11, inclusive, 15 and 16 thereof, that said plaintiff is now estopped from claiming that any of the claims of said patent have sufficient breadth to include any signal flares manufactured, used or sold by this defendant. [30]

As and for their second amended answer to the alleged Second Cause of Action asserted in the complaint on file herein, defendants admit, deny and allege as follows:

XII.

Defendants repeat their above-stated answers to Paragraphs IV to VII, inclusive, of the complaint and incorporate the same by reference as though specifically set forth herein.

XIII.

Defendants deny the allegations of Paragraph IX of the complaint.

XIV.

Defendants deny the allegations of Paragraph X of the complaint.

XV.

Defendants deny the allegations of Paragraph XI of the complaint.

XVI.

Defendants deny the allegations of Paragraph XII of the complaint, and allege the facts to be that the signal flares of their manufacture have approval of the United States Coast Guard and are equal in quality and workmanship to flares of like category produced by plaintiff herein.

XVII.

Defendants deny the allegations of Paragraph XIII of the complaint.

XVIII.

Defendants deny the allegations of Paragraph XIV of the complaint.

XIX.

For a Further, Separate and Affirmative Defense to the alleged Second Cause of Action, defendants allege that in [31] making the accused signal flare they have utilized conventional shapes, materials, and the natural color of such materials as is necessary in the production of devices inherently suited for the purpose for which they are intended, and that they have caused all such signal flares manufactured by them to be plainly marked with their

name and address and the specific approval number assigned thereto by the United States Coast Guard.

Counterclaim

For counterclaim against The Kilgore Manufacturing Company, a corporation, the defendants and counterclaimants, Signal Manufacturing Company, a corporation, and Charles Schneider, doing business as Signal Manufacturing Company, allege as follows:

1.

The jurisdiction of this Court arises from the patent laws of the United States and by reason of the provisions of Section 2740 of the Judicial Code now 28 U. S. Code 2201 and 2202, because there is an actual controversy now existing between the parties in respect of which defendants need a declaration of and rights by this Court, which controversy arises over the question of validity and infringement of United States Letters Patent No. 1,947,834, issued February 20, 1934, the plaintiff, The Kilgore Manufacturing Company, asserting ownership in the said patent.

2.

Defendant, Signal Manufacturing Company, alleges that it is a corporation organized under the laws of the State of California and prior to November 1, 1947, had a regular and established place of business at Los Angeles, County of Los Angeles, State of California; that Charles Schneider, an individual, is an individual residing at Los Angeles.

County of Los Angeles, [32] State of California, doing business under the fictitious name and style of Signal Manufacturing Company, with a place of business at Los Angeles, California.

3.

Defendants and each of them jointly and severally allege that they have been charged with the infringement of Letters Patent No. 1,947,834 by The Kilgore Manufacturing Company; defendants and each of them allege that Letters Patent No. 1,947,834 and each and every claim thereof invalid, void and of no effect for the reasons stated in subdivisions (a), (b), (c), (d) and (e) of Section VIII of defendants' answer above set forth, and defendants adopt, repeat and reallege as Paragraph 3 of this counterclaim each and every of the allegations contained in subdivisions (a), (b), (c), (d) and (e) of Section VIII of their answer above set forth with like effect as if herein fully repeated.

4.

Defendants adopt, repeat and reallege as Paragraph 4 of this counterclaim each and every of the allegations contained in Section IX of defendants' answer above set forth with like effect as if herein fully repeated.

5.

Defendants adopt, repeat and reallege as Paragraph 5 of this counterclaim each and every of the allegations contained in Section X of defendants' answer above set forth with like effect as if herein fully repeated.

6.

Defendants adopt, repeat and reallege as Paragraph 6 of this counterclaim each and every of the allegations contained in Section XI of defendants' answer above set forth with like effect as if herein fully repeated. [33]

7.

Defendants and each of them further allege that plaintiff, The Kilgore Manufacturing Company, knowing full well that said Letters Patent No. 1,947,834 were invalid, void and of no effect, filed suit against these defendants, circularizing the trade and represented to the trade that the defendants and each of them were infringers and unfairly utilized the subject matter of said Letters Patent and harassed the trade to the damage and injury of these defendants in their business; that plaintiff, The Kilgore Manufacturing Company, has delayed proceedings conducive to crystallization of the issues, gave evasive answers to defendants' request for admissions, took depositions, both in Los Angeles and Columbus, Ohio, and subjected these defendants to unnecessary expense.

Therefore, defendants, having fully answered the complaint herein and having filed with their second amended answer the foregoing counterclaim for a declaratory judgment, pray as follows:

A. For a judgment and decree adjudging the patent in suit, No. 1,947,834, and each and every of the claims thereof to be invalid, null and void.

B. For a judgment and decree holding that the defendants, jointly and severally, have not performed any acts in infringement of Letters Patent No. 1,947,834.

C. For a judgment and decree that defendants, jointly and individually, have not been guilty of any acts of unfair competition nor have they adopted and used unfairly or unlawfully any distinctive features of plaintiff's flares. [34]

D. For a judgment and decree that the shape of the projectiles and flares manufactured and sold by plaintiff and manufactured and sold by defendants and each of them is functional and has not acquired a secondary meaning.

E. That plaintiff's complaint be dismissed as to both causes of action and that defendants have a judgment as prayed for in their counterclaim.

F. That by way of further relief the Court grant an injunction enjoining and restraining plaintiff, its agents, employees, attorneys, assigns and those acting in privity therewith from asserting, contending, claiming or representing that said Letters Patent No. 1,947,834 or any claim thereof have been infringed by defendants, either individually or jointly.

G. That costs, disbursements and attorneys' fees incurred by defendants be assessed against the plaintiff, defendants to have judgment and execution therefor.

H. For such further relief as may seem proper to the Court.

/s/ C. A. MIKETTA,

/s/ W. W. GLENNY,

Attorneys for Defendants and
Counterclaimants.

[Lodged]: Dec. 9, 1949.

[Endorsed]: Filed Dec. 21, 1949. [35]

[Title of District Court and Cause.]

ANSWER TO
DEFENDANTS' COUNTERCLAIM

Now comes the Plaintiff and answering Defendants' counterclaim filed herein admits, denies and alleges as follows:

I.

Answering paragraph 1 of Defendants' counterclaim, Plaintiff admits the allegations contained therein.

II.

Answering paragraph 2 of Defendants' counterclaim, Plaintiff admits the allegation contained therein.

III.

Answering paragraph 3 of Defendants' counterclaim, Plaintiff admits that Defendants have been charged with infringement of Letters Patent No. 1,947,834 by Plaintiff but denies each and every other allegation contained in said paragraph. [37]

IV.

Answering paragraph 4 of Defendants' counter-claim, Plaintiff denies each and every allegation contained therein.

V.

Answering paragraph 5 of Defendants' counter-claim, Plaintiff denies each and every allegation contained therein.

VI.

Answering paragraph 6 of Defendants' counter-claim, Plaintiff denies each and every allegation contained therein.

VII.

Answering paragraph 7 of Defendants' counter-claim, Plaintiff denies each and every allegation contained therein.

Wherefore, Plaintiff prays for the relief hereinbefore prayed for in the pleadings of record in this cause.

Dated: March 22, 1950.

/s/ WM. EDWARD HANN,
Attorney for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 22, 1950. [38]

[Title of District Court and Cause.]

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause having been tried on October 31st, November 1, 2 and 3, 1950, arguments being heard, and after due consideration, decision rendered on November 3, 1950, the Court enters the following Findings of Fact and Conclusions of Law, pursuant in Rule 52 of Federal Rules of Civil Procedure:

Findings of Fact

1. This suit involves an action by Plaintiff for infringement of claims 1 to 5, inclusive, and claims 7 to 11, inclusive, of United States Letters Patent No. 1,947,834, granted February 20, 1934, to Louis L. Driggs, Jr., and Henry B. Faber, and an action by Plaintiff for unfair competition. This suit also involves a counter-claim alleging all the claims of the patent in suit are invalid and not infringed and alleging that Plaintiff unfairly utilized the patent in suit and harassed the trade to the damage and injury to [63] defendants.

2. The Court has jurisdiction of the subject matters and of the parties to the actions.

3. Plaintiff had and has full title to the patent in issue, had the right to bring this action for infringement of the patent and has the right to collect damages from and after a date in July, 1947, on which date Defendant, Signal Manufacturing

Company, initiated manufacture of a flare like Exhibit 2.

4. Defendant, Signal Manufacturing Company, was a California corporation and that in July, 1947, said Defendant started the manufacture and sale of the flares, like Exhibit 2, complained of by Plaintiff.

5. Defendant, Charles Schneider, is a resident of Los Angeles County, State of California, and from July, 1947, to November 1, 1947, directed and controlled the Defendant's, Signal Manufacturing Company, manufacture and sale of the flares complained of by Plaintiff.

6. From and after November 1, 1947, the said Defendant, Signal Manufacturing Company, a corporation, ceased said manufacture and sale, and Defendant, Charles Schneider, an individual, doing business under the fictitious name and style of Signal Manufacturing Company, continued and still continues the manufacture and sale of flares substantially without change from the flare Plaintiff's Exhibit 2.

7. Charles Schneider, doing business as Signal Manufacturing Company, was made a party Defendant to this cause of action and the first amended answer filed in this action on behalf of Signal Manufacturing Company, a corporation, was also the answer of Charles Schneider.

8. Defendants, Signal Manufacturing Company, and Charles Schneider, manufactured and sold

flares like Exhibit 2 since a date in July, 1947, and that Exhibit 25 is a longitudinal cross-section [64] of a flare like Exhibit 2.

9. The patent in suit relates to a signal flare which is used principally in conjunction with a pistol from which it is fired. The signal flare includes a cartridge case which fits into the barrel of a pistol. A projectile shell including a tube or side wall is formed integrally with a base. This projectile shell carries the pyrotechnic material and an expelling charge for ejecting the pyrotechnic material from the shell at the desired timed moment. A black powder propelling charge is interposed between the base of the projectile shell and the interior walls of the cartridge case, which when ignited by a firing cap in the base of the cartridge case, carries the projecting shell, to be propelled from the pistol, to a height of at least one hundred and fifty feet. A delay fuse, secured in the base of the projectile shell, is ignited by the burning propelling charge in the cartridge case, and after a predetermined time, causes ignition of the expelling charge in the projectile shell to expel the contents of the projectile shell. Preferably the delay fuse ignites the expelling charge in the projectile shell when the shell reaches substantially the zenith of its upward flight. In the embodiment of the invention under consideration in the instant cause of action, the projectile shell is utilized for expelling a flare and a parachute, the flare being attached to the parachute, which latter permits the flare to

descend slowly to earth. A thrust member in the form of a stick is interposed between the flare and parachute to insure prevention of the collapse of the folded parachute as the flare pushes the parachute out of the projectile shell when the expelling charge is ignited. Gas checks, usually employed in ammunition, are utilized. The open end of the projectile tube is closed in the usual manner for preventing the ingress of water or moisture-laden air.

10. The inventors of the patent in suit devised something new and useful. They produced a new combination of old elements [65] which together produced a better result than anything previously known to the art.

11. The subject matter of the patent in suit answered a need. It met with commercial success. Prior to the advent of the invention of the patent in suit, projectile shells were formed from two or more parts and at the joint or joints of these multiple parts, the material of the parts had to be of sufficient thickness for welding or otherwise securing the parts to one another. Those structures thus necessitated employing heavier materials than the integral tube and base structure of the projectile shell of the patent in suit. Because of the weight of the heavy multiple projectile shell, the shell had to be made small in caliber to lift the same to the desired elevation when using a hand fired pistol. Consequently, the smaller caliber shell could not carry a flare that provided sufficient burning time and sufficient candlepower.

12. Prior to the advent of the invention in suit, no one had devised a light weight metallic projectile shell which would meet the desires of lift to the desired elevation, contain a flare of sufficient candle power, burn for a sufficient desired time, and which projectile shell insured against premature ignition of the expelling charge therein.

13. The signal parachute flare, embodying multiple part projectile shells, designed to be shot from Very and Webley-Scott pistols and valued at a million dollars were dumped into the Atlantic Ocean, after World War I, because of the failure of that type of flare to function properly.

14. By forming the projectile shell with an integral base and side walls, premature ignition of the expelling charge in the projectile shell, by the propelling charge in the cartridge case, was entirely eliminated, making possible for the first time the use of relatively thinner side walls of the projectile shell, yet assuring prevention of premature ignition of the expelling charge in the [66] projectile shell. The base of the projectile shell being integral with the side wall of the shell prevents mutilation of the side wall by the explosions of the propelling charge in the cartridge case and the expelling charge in the shell itself. This sturdy, yet light weight, projectile shell resulted in reducing the quantity of propelling charge in the cartridge case to lift the projectile shell to the desired elevation, or, stated in another way, by providing a light weight projectile shell, which insured against premature igni-

tion of the expelling charge therein, the projectile shell and contents, which would burn for thirty seconds, could be elevated to the desired height of one hundred and fifty feet or more when fired by a pistol that could be held in the hand, without serious recoil. Moreover, by this construction, the weight of the projectile shell was reduced to such that no serious injurious result would follow should the falling empty shell strike, for example, an occupant of a lifeboat.

15. Signal parachute flares made in accordance with the teachings of the patent in suit were the first successful distress signals that could be fired from a hand-held pistol and could be seen from a distance of twenty-five or thirty miles when shot by an occupant in a lifeboat.

16. Signal parachute flares made in accordance with the teachings of the patent in suit are the type approved by the United States Coast Guard, used extensively on vessels, required on certain size vessels and used extensively by the United States Army, Navy and Air Corps.

17. Powers' patent No. 116,094 granted in 1871, Exhibit F-3, and the British Patent No. 2,257 of 1870, Exhibit F-21, the latter being cited by the United States Patent Office during the prosecution of the application of the patent in suit, each show a cartridge case formed with a tubular side wall and an integral base. There is no suggestion in either of these patents of the use of a cartridge case in combination with a projectile shell having integral

side wall and base as defined in claims 10 and 11 of the patent in suit. [67]

18. None of the other prior art patents or literature, relied on by the Defendants at the trial of the case, discloses a projectile shell of integral side wall and base construction as defined in claims 10 and 11 of the patent in suit. The Driggs, et al., Patents Nos. 1,712,383, Exhibit F-16; 1,754,986, Exhibit F-17; 1,776,755, Exhibit F-18; 1,785,770, Exhibit F-19; the publication, History of Military Pyrotechnics in World War, Exhibit F-27; Very Parachute Cartridge, Exhibit F-32; Very Star Cartridge, Exhibit F-31; each show projectile shells in which the base and side walls are not formed integrally. The projectile shell made by Plaintiff in accordance with the disclosure in Driggs, et al., No. 1,776,755, Exhibit F-18, was formed of a plurality of pieces and is so described in said patent, see page 1, starting with line 62; said shell was subject to leakage.

19. None of the patents relied upon by Defendants anticipate or specifically restrict claims 10 and 11 of the patent in suit, nor do any of the other patents pleaded as anticipation in their answer.

20. The patentees were the original and first inventors of the invention of the patent in suit, as defined by claims 10 and 11 here in issue. The invention defined by claims 10 and 11 are directed to a combination that is not only new and useful, but embodies invention and constitutes patentable subject matter.

21. Defendants' flare, as exemplified by Exhibits 2 and 25 perform the same work in the same way by substantially the same structure defined by claims 10 and 11 of the patent in suit.

22. Defendants manufacture and sell flares in violation of claims 10 and 11 of the patent in suit and thereby infringe said patent. The infringement by Defendants was conscious, deliberate and wilful.

23. Claims 1 to 5, inclusive, are not limited to a projectile shell in combination with a cartridge case. Claim 9 is not [68] limited to a projectile shell having integral side wall and base. Claims 7 and 8 do not recite a thrust member.

24. Defendants have copied Plaintiff's device, not only internally but externally, with a few minor exceptions, both functional and non-functional.

25. The similarity of external appearance of the Defendants' product is not likely to confuse the public interested in this field or the public active in this field as to the origin of Defendants' product.

26. There is no evidence or testimony submitted showing that Plaintiff unfairly utilized the patent in suit or harassed the trade to the damage and injury to Defendants.

Conclusions of Law

1. Claims 10 and 11 of the United States Letters Patent No. 1,947,834 describe the combination and all essential elements of it with sufficient specificity and are valid and infringed.

2. Claims 1 to 9, inclusive, and 12 to 23, inclusive, of said Patent No. 1,947,834 are invalid.

3. Defendants' product, exemplified by Exhibits 2 and 25, incorporate the invention defined by claims 10 and 11 of the patent in suit and constitute an infringement of said claims.

4. Plaintiff is entitled to an injunction against further infringement by Defendants and those controlled by Defendants.

5. Plaintiff is entitled to a judgment against Defendants for general damages which Plaintiff may have sustained as a proximate result of infringement of claims 10 and 11 of the patent in suit at any time subsequent to the 1st of July, 1947, such damages to be assessed as provided by Section 4921 of the Revised Statutes as amended, 35 U. S. Code 70.

6. Plaintiff is entitled to an accounting from Defendant, [69] Signal Manufacturing Company, a corporation, and Charles Schneider, doing business as Signal Manufacturing Company, to aid the determination of issue of Plaintiff's damages resulting from infringement by Defendants of claims 10 and 11 of the patent in suit.

7. Plaintiff will recover costs of the Defendants, to be taxed by the Clerk.

8. Plaintiff's second cause of action, asserted in the bill of complaint, and Defendants' counterclaim,

asserted in the second amended answer and counter-claim, are hereby dismissed.

Dated: November 9, 1950.

/s/ WARREN H. F. SCHMIEDING,
Attorney for Plaintiff.

Approved as to form:

C. A. MIKETTA,

W. W. GLENNY,

By
Attorneys for Defendants.

File not signed, Jan. 31, 1951.

/s/ MATHES,
Judge.

[Lodged]: Nov. 9, 1950.

[Endorsed]: Filed Jan. 31, 1951. [70]

[Title of District Court and Cause.]

DEFENDANTS' OBJECTIONS TO AND RE-
VISIONS OF FINDINGS OF FACT AND
CONCLUSIONS OF LAW AS PROPOSED
BY PLAINTIFF

Defendants object to the findings of fact and conclusions of law filed by plaintiff November 9, 1950, because:

(1) They do not give the Appellate Court a

clear understanding of the basis of the decision.

(2) Certain findings are contrary to the evidence.

(3) Certain findings are unsupported by the evidence.

The Supreme Court in *Schneidermann v. United States*, 320 U. S. 118, at 129, has ruled that findings of ultimate facts are no longer sufficient. It appears desirable to state the basis of the decision in considerable detail (see *U. S. v. Bergmann*, 47 Fed. Supp. 765; sent back by CCA 9 for more detailed findings). There are no findings of fact to support conclusion of law No. 2. [40] In order to provide basis for conclusion No. 2, the following findings of fact should be added:

A-1. The combination described in claims 1-9 and 12 is not a combination which would produce a new and improved result. Claims 1-9 and 12 are too broad and do not constitute a complete combination. Claims 1-6, 15, 16, 18, 19 and 20 do not include a cartridge. Claims 6, 9, 15, 16, 17 and 20 do not require that the projectile shell be made of one piece of metal with integral walls and a bottom. None of the claims specify the necessary taper to the end of the fuse. Claims 1-3 and 5-23 do not include the wooden annulus surrounding the expelling charge and acting as a cushion. Claims 1-3, 6-9, 12 and 17-23 do not include the necessary thrust stick or means to prevent collapse of the parachute. The evidence establishes and the

Court finds that there is no new or patentable result attained by the combinations recited in claims 1-9 and 12-23 and that the combinations of said claims are not new.

A-2. During prosecution of the patent in suit Driggs and Faber solicited claims directed to a flare shell comprising an apertured base with a smooth exterior without shoulders and an integral drawn wall of thinner section than the base, said shell being formed of one piece drawn aluminum body, but such claim was rejected by the United States Patent Office and withdrawn by Driggs and Faber. In lieu of such withdrawn claim, Driggs and Faber obtained claims (such as claim 1) in which specific reference was made to a tubular eyelet having a shoulder inserted in the aperture, the shoulder resting on the outside of the base of the shell. During the prosecution of [41] the patent in suit, the Examiner and Board of Appeals of the United States Patent Office rejected claims such as 35, 36 and 38 directed to a combination of a one-piece drawn shell, a delay fuse and a cartridge case on the ground of lack of invention, and applicants assented to such rejection and withdrew such claims (Admission A-20, Exhibit G, pages 17-18; defendants' Exhibit A, page 68). A one-piece projectile shell and a short cartridge for use as a signal device, the shell contained a pyrotechnic, is shown in patent No. 1,641,549, defendants' Exhibit F-14.

A-3. The evidence establishes and plaintiff admits that more than two years prior to the filing date of the patent in suit there was publicly used and sold in the United States a tubular projectile having a transversely extending bottom, an aperture in such bottom and a tubular eyelet inserted into such aperture, the eyelet having a flange resting on the outside of the base or bottom, the eyelet having a reduced inner end and a fuse powder in the eyelet (Defendants' Exhibit G, page 8, Admission A-6); that the manufacture of a case or shell by drawing metal to produce a shell having side walls and a base integral therewith was known to others prior to the earliest date of invention by Driggs and Faber.

A-4. The evidence establishes that prior to the earliest date of invention by Driggs and Faber of the subject matter of the patent in suit, there was described in printed publications and known to others parachute flares arranged to shoot a flare into the air, ignite such flare and permit the flare to descend while attached to a parachute (exemplified by defendants' [42] Exhibits F-1, F-16, F-18, F-27). The evidence establishes that the prior art showed and described flare signals arranged to be shot from a hand gun, such signals including a cartridge case or base cap provided with a percussion cap and propelling charge, in combination with a projectile shell carried by the cartridge, the base of the shell carrying a suitable delay fuse,

an expelling charge within the shell and an arrangement of gas checks or washers, flare candle, parachute, lines connecting the parachute to the flare candle, an end closure for the shell and means for preventing the parachute from being crushed or wadded during ejection from the shell. The evidence establishes that the cartridges of the prior art used in combination with such projectile shells and contents were provided with side walls and an integral base of metal and that the base of the cartridge was flanged or grooved to fit either breech or muzzle loading guns. That the shape of the cartridges was compatible with and fitted the shape and bore of the chambers of the guns.

Finding of fact No. 2 proposed by plaintiff is objected to. This is not a finding of fact but a conclusion of law and should be placed among the conclusions.

Finding of fact No. 3 proposed by plaintiff is ambiguously worded and should be rephrased in accordance with items 6 and 7 of the pretrial stipulation (Exhibit 21) filed January 14, 1949. [43]

Finding of Fact No. 9 proposed by plaintiff is objected to on the ground that it does not correctly state what is in the patent in suit and is unsupported by the disclosures of the patent in suit. The phrase "to a height of at least 150 feet" (appearing on page 3, lines 12 and 13) has no foundation in fact and the patent makes no reference to any stated height. This phrase should be stricken. The word "delay" (appearing in line 13 on page 3)

does not appear in the patent in suit and should be stricken. The phrase "at the desired timed moment," appearing in line 8, page 3, should be stricken, since this mode of operation does not appear in the patent in suit. The phrase "after a predetermined time," appearing in line 15, on page 3, should be stricken, because the patent in suit does not so state. The sentence in lines 17-19 reading, "Preferably the delay fuse ignites the expelling charge in the projectile shell when the shell reaches substantially the zenith of its upward flight," should be stricken, since this mode of operation is not stated in the patent in suit.

It is apparent that plaintiff is attempting to have the Court make findings on inference and not on facts, a patent is a legal document and cannot be construed or modified by parol testimony; it must be judged by what it shows on its face. Since a patent is a contract it must be constructed most strongly against the party using it. Proposed finding 9 is objected to because it attempts to read into the patent things which it does not state.

Proposed finding 9 is incomplete since it fails to include the annular wooden ring 7 around the expelling charge 6. Clauser testified that this wooden ring was necessary and plaintiff's counsel has represented that it is an element constituting the purported novel combination (R. 230, lines 8-17). Novelty was also claimed in the taper of the fuse (R. 229). Proposed finding 9 does not include these necessary elements and is, therefore, inaccurate, incomplete and misleading. It is requested that [44]

the following finding be substituted in lieu of finding 9 as proposed by plaintiff:

B-1. The flare signal construction described in the patent in suit includes a cylindrical shell or case, referred to as a projectile shell, fitted into the open end of a base cap or cartridge. The cartridge contains a propelling charge and a primer or firing cap. The projectile shell is preferably made of one piece of metal, such as aluminum, with a relatively heavy base and thin side walls and carries a fuse in the base or bottom, an expelling charge surrounded by a wooden annulus, a flare candle, a parachute connected to the flare candle by suitable wire and cord, an end closure, gas checks or felt washers between the candle and parachute and beneath the candle, and a stick or thrust member between the end closure and flare candle. Defendants' flares are exemplified by Exhibits 2 and 25. Plaintiff's flares are exemplified by Exhibits 7 and 28. Both plaintiff's and defendants' flares use a felt washer between the shoulder of the fuse and the bottom of the projectile case, such washer not being shown in the patent in suit.

Finding No. 10 proposed by plaintiff is objected to as a statement of conclusion and not a statement of facts of value to an Appellate Court in appraising the basis upon which the conclusions of law rest. It does not state wherein the combination was new (plaintiff's counsel states that the combination is

old except for the one-piece shell; R. 327 and 328). It does not identify the alleged new result. The record belies the finding of a "better result." [45]

"The Court: As a matter of fact, it is claimed where the prior art knew better flares of the same combination for these purposes, isn't it?

"Mr. Schmieding: That is true." (R. 341, lines 9-12.)

It is submitted, therefore, that proposed finding 10 is unsupported by the evidence and in lieu thereof defendants submit that the following finding be made:

C-1. The evidence establishes that there is no novelty in, and plaintiff does not claim that there is novelty in, the arrangement and combination of a projectile containing a parachute candle or flare, protecting washers or gas checks, expelling charge and fuse with a cartridge case containing a propelling charge for such projectile and a primer or firing cap (defendants' Exhibit G, page 3, Admission D-6 (d)). The evidence shows that the patentee Driggs, now deceased, had testified that there was nothing new in the combination of a cartridge case with a projectile containing the contents nor in the arrangement of contents of the projectile.

C-2. The evidence establishes that prior to the earliest date of invention by Driggs and Faber of that which is described and claimed

in the patent in suit there was known to others in the United States signal flare ammunition including a cartridge case and a projectile, the cartridge being short and the projectile being relatively long; and that there was described in prior publications and known to others a parachute-type flare including a projectile shell, an annular wooden disc partially surrounding the expulsion charge near one end of the shell, a flare, a parachute, a wire or string connecting the [46] parachute to the flare and a washer or gas check between the parachute and the flare (exemplified by Exhibit 16).

C-3. The evidence establishes and the Court finds that there is no patentably new relationship or cooperation between the various elements of the signal flare described and claimed in the patent in suit; that the propelling charge of the cartridge propels the projectile case or shell by the same mode of operation as that used in devices of prior expired patents; that the ejecting charge carried in the projectile shell expels the contents of such projectile shell by the same mode of operation as that occurring in devices of prior patents. Plaintiff's expert and director of research admitted that the action of the eyelet or delay fuse was not influenced by the presence or absence of walls on the projectile shell (R. 246-247) and that whether the projectile shell was made of one or two pieces would not affect the burning characteristics of the flare candle composition (R. 225, lines 19-23; R. 223, lines 9-18).

Finding 11, as proposed by plaintiff, is objected to on the ground that it is contrary to the evidence. There is no evidence as to the existence of a "need"; there is no evidence as to commercial success. The matter in lines 4-8 on page 4 of plaintiff's proposed findings is in direct opposition to the record in this case (see defendant's Exhibit 14 and pages 68-69 of defendants' Exhibit A). The matter in lines 8-15 cannot be supported by the evidence in this case, particularly in view of the teachings of the prior art which use "light metal" such as aluminum [47] in manufacturing projectile shells.

It is submitted that finding 11 should be stricken as not supported by the evidence.

Defendants object to finding 12 as proposed by plaintiff on the ground that it is contrary to the evidence, which clearly shows that the prior art had taught the use of light metal such as aluminum for use in projectile shells. Statements as to "sufficient candle power," and "desired time" have no bearing here, since they do not affect the question of invention. The Court is not adjudicating Coast Guard specifications which require certain performance characteristics, but instead, is only concerned with the structural means described in the patent.

It is submitted that finding 12 should be stricken as unsupported by the evidence.

Finding 13, as proposed by plaintiff, is contrary to Exhibit F-27 and contrary to Clauser's testimony (R. 216-217). Coast Guard specifications require replacement of all flares, including those made by plaintiff and defendants, three years from their date

of manufacture. Findings of fact should not be burdened with erroneous statements nor with statements having no pertinency to the issues of validity and infringement. Finding 13 should be stricken as being contrary to the evidence and irrelevant.

Finding 14 proposed by the plaintiff is objected to on the following grounds: The statement appearing in lines 27-32 on page 4 is not true. Premature ignition of the expelling charge is prevented by the taper on the end of the fuse (Clauser, R. 187, lines 15-18). This taper is very important (R. 187, line 6); the device is dangerous without it (R. 188, lines 11-22). [48]

Moreover, the statement appearing in lines 1-4 on page 5 is not true. Clauser had testified that the wooden annulus acted as a cushion and prevented disruption of the thin walls of the projectile case (R. 184-185).

Finding 14 is therefore erroneous, incomplete, and contrary to the evidence. It is submitted that this finding should be stricken and the following substituted in its place:

D-1. By making the projectile shell out of light metal, such as aluminum, a lightweight projectile shell was obtained. By making side walls and bottom of the shell from one piece of aluminum, joints were eliminated.

Finding 15, as proposed by plaintiff, is objected to on the ground that it is not supported by the evidence. There is no evidence to support the statement that plaintiff's flares were "the first successful

distress signals.” A signal is only “successful” when it is seen under the proper conditions.

We suggest that finding 15 be revised to read:

E-1. The higher a parachute-type flare is shot and liberated, the greater the distance it can be seen. The height to which the projectile is shot depends upon the kind and quantity of propellant used in the cartridge. The Coast Guard specifications require that the parachute be ejected at a height of not less than 150 feet.

Finding 16 proposed by plaintiff is objected to as misleading and inaccurate. The Coast Guard does not require the use of a one-piece shell, a wooden annulus, a tapered delay fuse or a thrust stick. It is submitted that finding 16 should be stricken and revised to read as follows: [49]

F-1. Signal parachute flares as manufactured by plaintiff and defendants and exemplified by Exhibits 2 and 25 (defendants’ flares) and Exhibits 7 and 28 (exemplary of plaintiff’s flares), are used by the United States Army, Navy, Air Corps and on vessels, and are subject to approval by the United States Coast Guard.

Proposed finding 17 is objected to as misleading and contrary to the evidence. The last sentence of this finding, appearing in lines 30-33 on page 5, should be rewritten to read:

These patents do not disclose the use of a cartridge case in combination with a projectile shell having integral side wall and base as de-

fined in claims 10 and 11 of the patent in suit, but such combination is shown in patent No. 1,641,549 (Exhibit F-14) and in patent No. 1,776,755 (Exhibit F-18).

Finding 18 as proposed by plaintiff. The first sentence of this finding is contrary to the evidence and should be stricken, because defendants' Exhibit F-14, patent No. 1,641,549, shows a projectile shell with an integral bottom and plaintiff has admitted that such projectile shells were old (Admission B-5(d), page 11, defendants' Exhibit G).

The last sentence of this finding (lines 10-14) should be stricken as contrary to the evidence. Exhibit F-18 speaks for itself. Even if the makers did not follow the showings of the patent, that does not affect or change the documentary showing.

Proposed findings 19 and 20 submitted by plaintiff are objected to as statements of conclusions and not findings of fact; it is suggested that these findings be stricken and the [50] following be substituted in their stead:

G-1. That no single prior art patent specifically shows each and every element of the purported combinations as stated in claims 10 and 11.

Finding 21, as proposed by plaintiff, is contrary to the evidence. It has been pointed out that claims 10 and 11 do not call for the "very, very important" tapered end on the fuse; they do not call for the annular wooden ring which Clauser stated was essential and which plaintiff's counsel stated was an

element of novelty in combination with the walls of the shell; the claims do not include necessary gas checks; they do not define a tight fit between the fuse and the bottom of the shell; they do not state that the parachute must be connected to the flare candle. Defendants employ a separate gas check or washer between the delay fuse and bottom of the projectile shell to prevent cracking of the delay fuse composition and such mode of operation and means are not shown in the patent in suit.

In view of these differences, proposed finding 21 is contrary to the evidence, incorrect, and should be stricken.

Finding 22, as proposed by plaintiff, is objected to. Infringement is a conclusion of law. Furthermore, there is no evidence to justify the conclusion that defendants' acts were conscious, deliberate and wilful. Admittedly defendants engaged in the manufacture of signal flares, but their acts should not be condemned; they had the same right to enter into this business as any other member of the public.

It is requested that proposed finding 22 be stricken and the following substituted in its [51] stead:

H-1. Defendants manufacture and sell signal flares as exemplified by Exhibits 2 and 25 and such flares conform to the requirements expressed in the United States Coast Guard specifications. Defendants' flares use a one-piece projectile shell taught in patent No. 1,641,549 (Exhibit F-14), a wooden annulus, as taught in patent No. 1,712,383 (Exhibit F-16),

and arrange the contents of the projectile shell in the manner of the contents of patent No. 1,776,755 (Exhibit F-18). In addition, defendants use a delay fuse without a taper and use a gas check or washer between the delay fuse and bottom of the projectile shell.

Proposed finding 23 is incomplete and does not follow your Honor's ruling. It is submitted that in lieu of finding 23, as proposed by plaintiff, defendants' proposed finding A-1 (proposed on page 2 of these objections) should be substituted.

Proposed finding 24 is objected to on the ground that it does not conform to the evidence and is actually unsupported by the evidence. No non-functional, unique element has been disclosed or described by the testimony. There are no unique, non-functional, decorative features in plaintiff's flare and therefore it cannot be stated that defendants have copied non-functional features. Furthermore, there is no evidence of actual copying and therefore the entire proposed finding 24 should be stricken as contrary to the evidence and incapable of being supported by the evidence.

It is believed that the Court should make the following finding in order to prevent any subsequent assertion on the part of the plaintiff as to functional features: [52]

1-1. The evidence establishes that the taper of the side walls of the cartridge case is produced during attachment of the projectile shell to the cartridge in order to obtain a necessary tight fit and is also influenced by the taper of

the chamber of the approved gun. The evidence establishes that it is customary in the pyrotechnic art to indicate the color of the signal flare by an application of color to the end portion of the device. The Court finds that the general appearance of the signal flare is functional.

Finding 25, as proposed by plaintiff, is objected to on the ground that it is incomplete and does not furnish sufficient basis for the holding of no unfair competition. It is believed that this finding should be stricken and the following findings substituted in its stead:

J-1. The evidence further establishes that both plaintiff and defendants mark their respective parachute flares with their respective company names, both on the projectile case and on the cartridge in accordance with requirements established by the United States Coast Guard. The evidence shows that defendants clearly and legibly mark all cartons containing their flares with the name "Signal Manufacturing Company" and similarly mark larger cartons containing larger quantities of flares.

J-2. Plaintiff has not proven and established that defendants have sold and palmed off upon the purchasing public the signal flare made by defendants as and for plaintiff's signal flare. There is no evidence that defendants have misrepresented their products as those of [53] plaintiff.

J-3. The evidence does not establish that ship chandlers and other purchasers recognize plaintiff's signal flares as plaintiff's products by reason of the appearance of plaintiff's products. There is no evidence that the form of plaintiff's signal flares is associated in the minds of the prospective purchasers with plaintiff as the source. No evidence was adduced to show that any purchaser was deceived by defendants.

Finding 26, as proposed by plaintiff, is objected to on the ground that it is not a correct statement and does not properly express the facts. Plaintiff's actions during trial, in attempting to mislead the Court into the belief that defendants were selling to the trade signal flares that did not pass specifications and inspection by the Coast Guard (R. 146, lines 15-20), are ample proof that the same tactics were used by plaintiff in misrepresentations to the trade.

Finding 26 should be revised to read as follows:

K-1. It has not been satisfactorily proven that plaintiff unfairly utilized the patent in suit and harassed the trade to the damage and injury of the defendants in their business, as alleged in the counterclaim.

In addition to the findings proposed by plaintiff, it is submitted that one additional finding should be made. Your Honor has probably noted that in some decisions the Courts have deemed it desirable to make a finding in support of the award of attor-

ney's fees. It is submitted, therefore, that in the instant case the following finding should be made by the Court: [54]

L-1. That plaintiff has delayed proceedings conducive to crystallization of the issues, took depositions in Los Angeles, California; Columbus, Ohio, and Westerville, Ohio, and did not introduce details of tests conducted during said depositions. That during trial plaintiff made misleading representations and urged novelty in elements and combinations disclaimed by the patentees of the patent in suit; that plaintiff admitted that there was no novelty in the contents of the projectile and later contended that the entire mechanism was in issue (R. 231); that plaintiff first alleged that all elements were old and later represented that there was novelty in the tapered fuse (R. 229), and in a combination with the wooden annulus (R. 230); that although the patentees had disclaimed the combination of a one-piece shell with a cartridge, plaintiff contended during trial that such combination was novel; thereby unnecessarily prolonging the trial and proceedings in this case and imposing a greater burden upon the defendants.

For the reasons above stated, it is respectfully requested that the findings of fact proposed by plaintiff be revised in accordance with the suggestions expressed hereinabove, even though your Honor does not modify his decision, as stated in

the record. However, it is hoped that, upon review of the facts, including defendants' memorandum on invalidity of claims 10 and 11, and upon hearing thereon upon a day to be set by the Court, your [55] Honor's decision will be modified to a holding of invalidity as to all of the claims.

Dated this 14th day of November, 1950.

/s/ C. A. MIKETTA,

/s/ W. W. GLENNY,

Attorneys for Defendants.

Service and receipt of copy acknowledged.

[Endorsed]: Filed Nov. 14, 1950. [56]

[Title of District Court and Cause.]

PETITION FOR REHEARING

Pursuant to your Honor's suggestion and in lieu of a motion for new trial, defendants request a hearing to review this case upon objections to findings as submitted by plaintiff, upon a day to be set by your Honor.

The Court has held claims 10 and 11 valid, but counsel is convinced that the patent in suit and each claim thereof is invalid. Counsel has a duty to the Court as well as to the client and does not want your Honor to render a judgment which is in error.

Defendants have relied upon admissions by plaintiff (defendants' Exhibit G), but during trial

plaintiff has repudiated such admissions and has advanced contentions which are contrary to plaintiff's former representations. One of these false [57] contentions, namely that there is novelty in a combination involving a one-piece projectile shell and a cartridge, has influenced your Honor into a holding that claims 10 and 11 are valid. Plaintiff's contention is contrary to the evidence.

For example, claim 35 was solicited by Driggs and Faber but was rejected by the United States Patent Office and the Patent Office Board of Appeals. This claim appears at the bottom of page 17 of defendants' Exhibit G and reads as follows:

"In combination, a one-piece drawn shell case with a delay fuse in the base thereof, an ejectable gas-producing means therein and a cartridge case detachably mounted on one end of said shell case having means therein for propelling the shell and detaching it from the cartridge case."

This claim is therefore fundamentally the combination of a one-piece shell with a cartridge. This claim was cancelled, withdrawn and disclaimed because it does not define a new combination nor does it include any new element. The Patent Office Board of Appeals in rejecting this claim stated:

"In the rejection of claims 35 and 36, the Examiner relies on the patent to Paulus, et al. As pointed out in his statement, this patent discloses everything set forth in these claims with the exception that it does not disclose the one-piece shell case 2 to have been formed by a

drawing operation. It is common, however, to so form one-piece shell cases as disclosed in the patent to Brandon. Furthermore, the shell case 1 in Paulus, et al., is deemed the full patentable equivalent of the drawn shell case recited in these claims."

(See page 68 of file history, defendants' Exhibit A.) [58]

The Paulus patent is No. 1,461,549, defendants' Exhibit F-14. The Brandon patent is defendants' Exhibit F-21. Upon glancing at the Paulus patent, your Honor will note that this shows a projectile case 1 which is made of one single piece of metal, the bottom being heavier than the side walls. The bottom portion of the projectile shell is held by the cartridge 12. The Brandon patent, F-21, in Fig. 4, shows a one-piece shell with a heavier bottom and thinner walls. The Powers patent, F-3, also shows a one-piece shell with an aperture in the bottom and an eyelet in such aperture.

The Board of Appeals held, as experts in patent law, that there was no invention involved in the combination as stated in claims 35, 36 and 38. It is to be remembered that the Patent Office did not have before it Exhibits F-3, F-16, F-17 and F-18, which make defendants' contention of invalidity even stronger.

Since the patentees disclaimed the combination of a one-piece shell and a cartridge, and one-piece projectile shells are admittedly not new (admission B-5 (d), page 11, defendants' Exhibit G), it was

error on the part of plaintiff to now urge patentable invention in such combination. It would be error for this Court to hold that such combination is patentable.

“It should be noted in this case that the File Wrapper and Contents indisputably shows that the patent office rejected any broad claims of discovery or invention as residing in the Williams construction * * *” (Judge Paul McCormick in *Patterson v. Roto-Hangar Co.* (Aug. 3, 1949), 83 P.Q. 333.)

There can be no invention in patent law in substituting an old one-piece shell for the shells shown in prior expired patents, such as F-17 and F-18. [59]

No new result is obtained since every old element acts in exactly the same way. It is certainly discretionary with the manufacturer of a flare shell (and not inventive) to put more or less propellant in the cartridge in order to get more or less height; it is simply a question of selection and not invention to put red, white or blue flares in his shell; it is not invention to so compound the flare candle that it burns for 20 seconds, 30 seconds or a minute.

The arrangement of flare, gas checks, parachute, thrust stick, etc., is clearly shown in the prior expired patents, such as F-17 and F-18, and, therefore, plaintiff cannot base invention on such arrangement.

It is believed that your Honor has been misled by plaintiff's confused, indefinite and shifty tactics. Your Honor may have been misled by the garrulous, biased and argumentative testimony of Clauser. De-

fendant relies upon your Honor's assurance that competent evidence only will be considered. The irrefutable evidence of prior patents and admissions should control. Validity cannot be supported by inferences from opinion testimony which was not amplified or supported by documentary proof.

It is therefore requested that the Court set a day convenient to your Honor for a review of this case in the light of the Memorandum on Invalidity of claims 10 and 11, the objections to findings as proposed by the plaintiff and the factual record in this case. In order to facilitate proceedings and terminate this case, defendants also submit findings of fact, conclusions of law and judgment in a form based upon invalidity of the entire patent in suit. The findings proposed by defendants include numerous references to the record and, although such references may be stricken in the final form of the findings, they may be of assistance to [60] your Honor in reviewing the entire case and the facts upon which validity of the entire patent should be found.

Dated this 14th day of November, 1950.

/s/ C. A. MIKETTA,

/s/ W. W. GLENNY,

Attorneys for Defendants.

[Endorsed]: Filed Nov. 14, 1950. [61]

At a stated term, to wit: The September Term, A.D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Friday, the 29th day of December, in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable Wm. C. Mathes,
District Judge.

[Title of Cause.]

MINUTE ORDER

Good cause appearing therefor, it is ordered that the order of Nov. 3, 1950, for findings and judgment and reference is vacated as to all its provisions and the cause is ordered placed on the calendar of Jan. 5, 1951, 2 p.m., for further oral argument. [62]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause having been tried on October 31st, November 1, 2 and 3, 1950, arguments being heard, and after due consideration, decision rendered on November 3, 1950, the Court enters the following Findings of Fact and Conclusions of Law, pursuant in Rule 52 of Federal Rules of Civil Procedure:

Findings of Fact

1. This suit involves an action by plaintiff for infringement of United States Letters Patent No. 1,947,834, granted February 20, 1934, to Louis L. Driggs, Jr., and Henry B. Faber, and an action by plaintiff for unfair competition. This suit also involves the issues raised by defendants' second amended answer and counterclaim alleging all [71] the claims of the patent in suit to be invalid and not infringed, and praying a declaratory judgment accordingly.

2. Plaintiff had and has full title to the patent in issue, had the right to bring this action for infringement of the patent, and has the right to collect damages during and after the month of July, 1947, on which date defendant Signal Manufacturing Company initiated manufacture of a flare like Exhibit 2.

3. Defendant Signal Manufacturing Company was a California corporation, and in July, 1947, said defendant started the manufacture and sale of the flares, like Exhibit 2, complained of by plaintiff.

4. Defendant Charles Schneider is a resident of Los Angeles County, State of California, and from July, 1947, to November 1, 1947, directed and controlled defendant Signal Manufacturing Company's manufacture and sale of the flares complained of by plaintiff.

5. From and after November 1, 1947, defendant

Signal Manufacturing Company, a corporation, ceased said manufacture and sale, and defendant Charles Schneider, an individual doing business under the fictitious name and style of Signal Manufacturing Company, continued and still continues the manufacture and sale of flares substantially without change from the flare, Exhibit 2.

6. Charles Schneider, doing business as Signal Manufacturing Company, was made a party defendant to this action and the first amended answer filed in this action on behalf of Signal Manufacturing Company, a corporation, was and is also the answer of Charles Schneider.

7. Defendants Signal Manufacturing Company and Charles Schneider manufactured and sold flares like Exhibit 2 since a date in July, 1947, and Exhibit 25 is a longitudinal [72] cross-section of a flare like Exhibit 2.

8. Defendants' flares are exemplified by Exhibits 2 and 25. Plaintiff's flares are exemplified by Exhibits 7 and 28.

9. The inventors of patent No. 1,947,834 in suit devised something new and useful. They produced a new combination of old elements which together produced a better result than anything previously known to the art.

10. The subject matter of the patent in suit is in a crowded field. It answered a long-existing need which had not been answered by the prior art, and met with commercial success.

11. Prior to the advent of the invention in suit, no one had devised a metallic projectile shell which would meet the need of lift to an effective elevation, carrying a flare of high candle power which would burn for a relatively long period of time, and be reasonably certain to function at the approximate zenith of its upward flight without premature ignition of the expelling charge therein.

12. Signal parachute flares made in accordance with the teachings of the patent in suit were the first successful distress signals that could be fired from a hand-held pistol and could be seen from a distance of twenty-five to thirty miles when shot by an occupant of a lifeboat.

13. The patentees were the original and first inventors of the invention of the patent in suit, as defined by claims 10 and 11 here in issue. The invention defined by claims 10 and 11 is directed to a combination that is not only new and useful, but embodies invention and constitutes patentable subject matter.

14. Defendants' flare, as exemplified by Exhibits 2 and 25 perform the same work in the same way by substantially [73] the same structure defined by claims 10 and 11 of the patent in suit.

15. Defendants manufacture and sell flares in violation of claims 10 and 11 of the patent in suit and thereby infringe said patent. The infringement by defendants has been and is conscious, deliberate and wilful.

16. Claims 1-9 and 12 are too broad and do not specify a complete combination. Claims 1-6, 15, 16, 18, 19 and 20 do not include a cartridge. Claims 6, 9, 15, 16, 17 and 20 do not specify a projectile shell of one piece of metal with integral walls and a bottom. Claims 1-3, 6-9, 12 and 17-23 do not include the necessary thrust stick or means to prevent collapse of the parachute. Claims 1-9 and 12-23 are invalid for the reasons stated.

17. Defendants have copied plaintiff's device, not only internally but externally, with a few minor exceptions, both functional and non-functional.

18. The similarity of external appearance of the defendants' product is not likely to confuse the public interested in this field as to the origin of defendants' product. The evidence discloses that plaintiff and defendants mark their respective parachute flares with their respective company names, both on the projectile case and on the cartridge in accordance with the requirements established by the United States Coast Guard. The evidence further shows that defendants clearly and legibly mark all cartons containing their flares with the name "Signal Manufacturing Company" and similarly mark larger cartons containing larger quantities of flares.

19. The evidence does not establish that defendants have sold or palmed off upon the purchasing public the signal flare made by defendants as and for plaintiff's signal flare; or that defendants have misrepresented their products as those [74] of

plaintiff; or that ship chandlers or other purchasers recognize plaintiff's signal flares as plaintiff's products solely by reason of the appearance of plaintiff's products; or that the form of plaintiff's signal flares is associated in the minds of the prospective purchasers with plaintiff as the source; or that any purchaser has been deceived by the similarity in appearance between defendants' flares and those of plaintiff.

20. The evidence does not establish that plaintiff unfairly utilized the patent in suit or harassed the trade to the damage or injury of defendants in their business, as alleged in the counterclaim.

Conclusions of Law

1. This court has jurisdiction of the parties and the subject matter.

2. Claims 10 and 11 of United States Letters Patent in suit No. 1,947,834 describe the combination and all essential elements of it with sufficient specificity and are valid and infringed.

3. Claims 1 to 9, inclusive, and 12 to 23, inclusive, of said Patent No. 1,947,834 are invalid for the reasons inter alia set forth in paragraph 16 of the findings of fact.

4. Defendants' product, exemplified by Exhibits 2 and 25, incorporate the invention defined by claims 10 and 11 of the patent in suit and constitute an infringement of said claims.

5. Plaintiff is entitled to a judgment against

defendants for general damages which plaintiff may have sustained as a proximate result of infringement of claims 10 and 11 of the patent in suit at any time subsequent to the 1st of July, 1947, such damages to be assessed as provided by section [75] 4921 of the Revised Statutes as amended, 35 U. S. Code 70.

6. Plaintiff is entitled to an injunction against further infringement by defendants and those controlled by defendants.

7. Plaintiff is entitled to an accounting from defendants Signal Manufacturing Company, a corporation, and Charles Schneider, doing business as Signal Manufacturing Company, to aid determination of issue of plaintiff's damages resulting from infringement by defendants of claims 10 and 11 of the patent in suit.

8. Plaintiff will recover costs from the defendants, to be taxed by the Clerk.

9. Plaintiff's second cause of action, asserted in the complaint, and defendants' counterclaim, asserted in the second amended answer and counterclaim, are hereby dismissed.

January 31, 1951.

/s/ WM. C. MATHES,

United States District Judge.

[Endorsed]: Filed January 31, 1951. [76]

In the United States District Court for the
Southern District of California, Central Division
Civil Action No. 7693-WM

THE KILGORE MANUFACTURING COM-
PANY, a Corporation,

Plaintiff,

vs.

SIGNAL MANUFACTURING COMPANY, a
Corporation, and CHARLES SCHNEIDER,
Doing Business as SIGNAL MANUFACTUR-
ING COMPANY,

Defendants.

INTERLOCUTORY JUDGMENT

This cause came on to be heard at the October, 1950, term and was tried in open court on October 31, November 1, 2 and 3; and thereupon, upon consideration thereof, it is ordered, adjudged and decreed as follows:

1. That United States Letters Patent No. 1,947,834 granted February 20, 1934, to Louis L. Driggs, Jr., and Henry B. Faber for Flare Signal, is good and valid in law as to claims 10 and 11 thereof.

2. That said Patent No. 1,947,834 is invalid in law as to claims 1 to 9, inclusive, and 12 to 23, inclusive, thereof.

3. That Plaintiff, The Kilgore Manufacturing Company, a corporation, is possessed of the full and entire right, title and interest in and to said Letters Patent, together with the rights of action for past infringement thereof.

4. That Defendants, Signal Manufacturing Company, and [78] Charles Schneider, doing business as Signal Manufacturing Company, have infringed claims 10 and 11 of said Letters Patent No. 1,947,834 by making and selling flare signals exemplified by Exhibits 2 and 25.

5. That Plaintiff, The Kilgore Manufacturing Company, recover of the Defendants, Signal Manufacturing Company, and Charles Schneider, doing business as, Signal Manufacturing Company, for all damages which Plaintiff may have sustained as a proximate result of the infringement of claims 10 and 11 of said Letters Patent No. 1,947,834, at any time subsequent to the 1st day of July, 1947, such damages to be assessed as provided by Section 4921 of the Revised Statutes as amended, 35 U. S. Code 70.

6. That this cause be referred to Howard V. Calverly, Esq., as special master, pursuant to Rule 53 of the Federal Rules of Civil Procedure, with directions to hear the accounting as to profits derived by Defendants from infringement of claims 10 and 11 of Letters Patent No. 1,947,834, and to hear all other relevant evidence on the issue of Plaintiff's damages to be assessed pursuant to Section 4921 of the Revised Statutes as amended, 35 U. S. Code 70, and to report to the Court his findings of fact and conclusions of law with respect to assessment of damages arising from said infringement.

7. That Plaintiff will recover costs of the Defendants, to be taxed by the Clerk.

8. That decision on Plaintiff's prayer for increased damages and attorneys' fees and determination of costs will be reserved until after determination of issue as to Plaintiff's damages.

9. That a perpetual injunction be issued out of and under the seal of this Court restraining the Defendants, Signal Manufacturing Company, and Charles Schneider, doing business as Signal Manufacturing Company, their officers, agents, servants, employees and attorneys and upon those persons in active concert or participation with them who receive actual notice of the order by personal [79] notice or otherwise, from directly or indirectly making, using, or selling or causing to be made, used or sold, any signal flares embodying the invention claimed in claims 10 and 11 of said Letters Patent No. 1,947,834, and specifically from directly or indirectly making, using or selling or causing to be made, used or sold, signal flares exemplified by Exhibits 2 and 25 herein, and from in any way infringing on said claims 10 and 11, or upon the rights of Plaintiff under said claims.

10. That plaintiff's second cause of action asserted in complaint and defendants' counter-claim asserted in the second amended answer and counterclaim, are hereby dismissed.

January 31, 1951.

/s/ WM. C. MATHES,

United States District Judge.

Judgment entered Feb. 1, 1951.

[Endorsed]: Filed Jan. 31, 1951. [80]

In the United States District Court for the
Southern District of California, Central Division

Civil Action No. 7693-WM

THE KILGORE MANUFACTURING COM-
PANY, a Corporation,

Plaintiff,

vs.

SIGNAL MANUFACTURING COMPANY, a
Corporation, and CHARLES SCHNEIDER,
Doing Business as SIGNAL MANUFACTUR-
ING COMPANY,

Defendants.

INJUNCTION

The President of the United States of America
to Signal Manufacturing Company, a corporation,
and Charles Schneider, doing business as Signal
Manufacturing Company, their officers, agents,
servants, employees and attorneys, and upon those
persons in active concert or participation with
them who receive actual notice of the Judgment by
personal notice or otherwise,
Greeting:

Whereas, by an Interlocutory Judgment entered
herein on January 31, 1951, it appears that United
States Letters Patent No. 1,947,834, in suit, is
valid and infringed as to claims 10 and 11 thereof,
and by said Judgment the Plaintiff was allowed an
Injunction against Defendants, their officers, agents,
servants, employees and attorneys, and upon those

persons in active concert or participation with them who receive actual notice of the Judgment by personal notice or otherwise; [82]

Now, Therefore, we do hereby command and strictly enjoin you, the said Signal Manufacturing Company and Charles Schneider, doing business as Signal Manufacturing Company, your officers, agents, servants, employees and attorneys, and those persons in active concert or participation with you, from making, using or selling, or causing to be made, used or sold, any signal flare embodying the invention claimed in claims 10 and 11 of said Letters Patent No. 1,947,834, and specifically from directly or indirectly making, using or selling, or causing to be made, used or sold, signal flares exemplified by Exhibits 2 and 25 herein, and from in any way infringing on said claims 10 and 11, or upon the rights of Plaintiff under said claims, which commands and injunctions you are respectfully required to observe and obey.

Hereof fail not, under penalty of the law thence ensuing.

Witness the Honorable William C. Mathes of the United States District Court for the Southern District of California, Central Division, this 14th day of February, 1951.

[Seal] EDMUND L. SMITH,
Clerk U. S. District Court, Southern District of
California.

By /s/ WM. A. WHITE,
Deputy Clerk.

Approved as to form:

C. A. MIKETTA,

W. W. GLENNY,

.....,

Attorneys for Defendants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Feb. 16, 1951. [83]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Signal Manufacturing Company and Charles Schneider, defendants herein, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the judgment and decree entered in this action on February 1, 1951, in this cause.

Dated: Los Angeles, California, this 16th day of February, 1951.

/s/ C. A. MIKETTA,

/s/ W. W. GLENNY,

Attorneys for Defendants.

[Endorsed]: Filed Feb. 17, 1951. [86]

[Title of District Court and Cause.]

CONCISE STATEMENT OF DEFENDANTS-
APPELLANTS' POINTS ON APPEAL
PURSUANT TO F.R.C.P. 75(d)

Now come the defendants - appellants, Signal Manufacturing Company and Charles Schneider, and in accordance with Rule 75(d) of the Federal Rules of Civil Procedure, make the following concise statement of points on which it intends to rely for appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment made and entered February 1, 1951, in this cause:

1. The Court erred in holding that claims 10 and 11 of United States Letters Patent No. 1,947,834, issued February 20, 1934, are valid and in failing to hold that said claims are invalid:

(a) For lack of invention in view of the prior art. [87]

(b) For lack of invention over other claims admitted to be invalid by plaintiff.

(c) For failure to include elements admittedly necessary to produce an operative device.

(d) For failure to define the purported invention with the precision required by R. S. 4888, 35 USC §33.

(e) Because the claims are for an aggregation of old elements performing their normal and known function, without a new result.

(f) Because they cover more than was allegedly invented by the purported patentees.

2. The Court erred in holding that defendants infringed claims 10 and 11 of Patent No. 1,947,834. The Court erred in holding that the infringement was conscious, wilful and deliberate.

3. The Court erred in failing to make findings of fact from which the basis of decision as to claims 10 and 11 can be understood by the Court of Appeals, and in failing to adapt and include findings as proposed by defendants.

4. The Court erred in finding that the combination of claims 10 and 11 embodies invention without stating what the purported invention consists of, and in disregarding the admissions of plaintiff as to what the patentees of the patent in suit allegedly invented. [88]

5. That the Court erred in holding that plaintiff recover damages and costs from defendants and in failing to award costs, disbursements and attorneys' fees to defendants and counter-claimants as prayed for.

6. The Court erred in failing to find that plaintiff unnecessarily delayed proceedings, made misleading and contradictory representations, attempted to repudiate plaintiff's admissions and unnecessarily prolonged trial and imposed an unconscienable burden on defendants.

Dated: Los Angeles, California, this 19th day of February, 1951.

/s/ C. A. MIKETTA,

/s/ W. W. GLENNY,

Attorneys for Defendants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Feb. 19, 1951. [89]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL BY DEFENDANTS-APPELLANTS

Defendants-Appellants in the above-entitled action, in conformity with Rule 75(a) of the Federal Rules of Civil Procedure, hereby designate the portions of the record, proceedings, and evidence to be contained in the record on appeal:

(1) Complaint.

(2) Answer (filed December 19, 1947).

(3) Stipulation (filed December 13, 1948).

(4) Pretrial Stipulation (filed January 14, 1949).

(5) Order Allowing Filing of Second Amended Answer and Counterclaim (filed December 21, 1949). [91]

(6) Second Amended Answer and Counterclaim

(lodged December 9, 1949, filed December 21, 1949).

(7) Answer to Defendants' Counterclaim (filed March 22, 1950).

(8) Findings of Fact and Conclusions of Law (proposed by Plaintiff), (lodged November 9, 1950).

(9) Defendants' Objections to and Revision of Findings of Fact and Conclusions of Law as Proposed by Plaintiff (filed November 14, 1950).

(10) Petition for Rehearing (filed November 14, 1950).

(11) Interlocutory Judgment (including page 3 as revised by the Court), January 31, 1951, (entered February 1, 1951).

(12) Findings of Fact and Conclusions of Law of January 31, 1951.

(13) Injunction, dated February 14, 1951.

(14) Notice of Appeal (filed February 17, 1951).

(15) Concise Statement of Defendants-Appellants' Points on Appeal Pursuant to FRCP 75(d).

(16) The following portions of the reporter's transcript of the pretrial proceedings held December 13, 1948:

[See Pre-Trial Proceedings pages 84 to 88 of this Printed Record.] [92]

(17) The following portions of the reporter's transcript of proceedings during trial beginning October 31, 1950:

[Paragraph 18 of this designation contains several narrative statements and page and line numbers of the Original Reporter's Transcript of Testimony supporting these statements. See Proceedings, pages 88 to 187 of this Printed Record.]

(18) The following portions of the reporter's transcript of the proceedings held January 8, 1951:

[See pages 88 to 187 of this Printed Record.]

(19) The following defendants' exhibits:

A. File history and contents of patent No. 1,947,834.

B. Analysis of claims.

E. General Rules and Regulations for Vessel Inspection, May, 1947.

F-1 to F-32. Book of prior art patents.

G. Admissions.

H-A. Projectile case.

H-B. Base cap.

K-1. Enlargement.

K-2. Enlargement.

(20) The following plaintiff's exhibits:

No. 2. Defendants' flare.

No. 7. Plaintiff's flare.

No. 25. Defendants' flare cut away.

No. 28. Plaintiff's flare cut away.

No. 31. Plaintiff's catalog.

(21) This Designation of Contents of Record on Appeal by Defendants-Appellants.

Dated: At Los Angeles, California, this 14th day of March, 1951.

/s/ C. A. MIKETTA,

/s/ W. W. GLENNY,

Attorneys for

Defendants-Appellants.

Service and Receipt of Copy acknowledged.

[Endorsed]: March 14, 1951. [100]

[Title of District Court and Cause.]

ORDER

Upon motion of counsel for defendants-appellants and in view of plaintiff's request for time to file counter-designation.

It Is Hereby Ordered:

That the time within which defendants-appellants shall docket their appeal with the Clerk of the Court of Appeals for the Ninth Circuit is hereby extended up to and including April 12, 1951.

Dated this 26th day of March, 1951.

/s/ WM. C. MATHES,

Judge, U. S. District Court.

[Endorsed]: Filed Mar. 27, 1951. [104]

In the District Court of the United States in and
for the Southern District of California, Central
Division

No. 7693-WM-Civil

Honorable William C. Mathes, Judge Presiding.

THE KILGORE MANUFACTURING COM-
PANY, a Corporation,

Plaintiff,

vs.

SIGNAL MANUFACTURING COMPANY, a
Corporation,

Defendant.

REPORTER'S TRANSCRIPT OF
PRE-TRIAL PROCEEDINGS

Monday, December 13, 1948

Appearances:

For the Plaintiff:

HAROLD W. MATTINGLY, ESQ.,
WARREN H. F. SCHMEIDING, ESQ.

For the Defendant:

C. A. MIKETTA, ESQ.

* * *

The Court: What is the status now as to the
claims in issue?

Mr. Mattingly: Claims 1 through 5 and claims
7 through 11, inclusive, only.

The Court: Claims 1 to 5, inclusive, and 7 to 11, both inclusive?

Mr. Mattingly: That is correct, your Honor.

The Court: What about 15 and 16?

Mr. Mattingly: Those have been withdrawn.

Mr. Miketta: They admit that we do not infringe them, your Honor.

Mr. Mattingly: That is contained as part of the answer to one of the defendant's requests for admission, that 15 and 16 will not be relied upon.

The Court: Very well. As far as limiting the prior art patents it is very difficult to do, but if any substantial number are necessarily included, I can always take that into consideration in fixing attorneys' fees.

* * *

Mr. Miketta: Well, your Honor, I would be very happy to do that if the plaintiff would answer that one request of mine and point out which is the novel element which they claim is the invention of this patent. When you come back with an answer that is a page long, which says everything that is in the claim, that is not an answer to that sort of a request. And how can we determine in advance what we are going to rely on as an anticipation if they do not disclose what is the [9*] novel element?

* * *

The Court: The statute says the claim itself in issue is supposed to tell you; so you do not have to ask anyone what the invention is. [10]

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

Mr. Miketta: That is my contention, your Honor, but Mr. Schmeiding did make a statement during our pre-trial conference which I think, if it could be re-expressed here and made a part of the formal stipulation, would permit me to limit the patents very materially, and that was a statement as to what you believe to be the invention, Mr. Schmeiding.

Mr. Schmeiding: If your Honor please, the claims of this patent are directed to a combination of elements. It is not just one new element that is the patentable feature of this patent. We do have a new element, but this new element is used in combination with old elements.

The Court: Do you care to state what the new element is?

Mr. Schmeiding: Yes. I believe I did that in my answer to his admission. I said the new element was a one-piece projectile shell including relatively thin side walls and a heavy base.

The Court: That, combined with the number of old elements, make what the patentee and the plaintiff claim to be a new combination?

Mr. Schmeiding: That is right. It is a combination of this new element with the old elements that make a new combination. We get a different result. [11]

* * *

The Court: It is stated here on the record. It is stipulated, I take it, gentlemen, that all the proceedings had here upon this pre-trial hearing shall be

deemed a part of the proceedings upon the trial?

Mr. Miketta: Yes, your Honor.

* * *

The Court: Is it so stipulated on behalf of plaintiff?

Mr. Mattingly: Yes, your Honor. [12]

* * *

Mr. Miketta: There is one other stipulation that I think we should be able to enter into, Mr. Mattingly, and that is this: That the drawings and recitals appearing in each of the United States Letters Patent cited as in the first amended answer were actually known in this country to others, and they are prima facie true as to the dates of the applications of each of those letters patent.

Mr. Mattingly: As to all of the United States Patents [16] I think we can stipulate. As to the foreign patents, I reserve——

Mr. Miketta: I excluded the foreign ones.

Mr. Mattingly: We will be glad to stipulate as to that with regard to all the United States patents.

* * *

[Endorsed]: Filed Jan. 13, 1949. [17]

[Title of District Court and Cause.]

REPORTERS' TRANSCRIPT
OF PROCEEDINGS

Los Angeles, California
Tuesday, October 31, 1950

Appearances:

For the Plaintiff:

WARREN H. F. SCHMIEDING, ESQ.,
WM. EDWARD HANN, ESQ.

For the Defendant:

CASIMIR A. MIKETTA, ESQ.

* * *

Mr. Schmieding: No. 2 is defendant's flare.

The Court: Exhibit 2 is defendant's flare?

Mr. Schmieding: And No. 7 is plaintiff's.

* * *

The Court: Very well, Exhibits 2 and 7 for identification will be received into evidence.

* * *

Mr. Miketta: May it please the court, I would like to introduce right at the beginning as Defendants' Exhibit A the complete file history and contents of the patent in suit No. 1,947,834, which was issued in 1934 on an application filed September 19, 1931. [18*]

* * *

The Court: Received into evidence as Defendants' Exhibit A.

* * *

Mr. Schmieding: That is merely a copy. I have here a certified copy which I would like to offer into evidence as Plaintiff's Exhibit 23, certified copy of the patent.

* * *

Mr. Miketta: I would also like to introduce into evidence for your Honor's use an analysis of the claims in suit which breaks down the claims to their various elements, this chart or tabulation being worded in precisely the language of the claims but breaking them down in graphical form so your Honor can get the difference between the claims much more quickly, as Defendant's Exhibit B. [19]

* * *

The Court: Received into evidence.

* * *

Mr. Miketta: Yes, we have. As Defendant's Exhibit C I would like to introduce into evidence claim 1 of the patent in suit in parallel comparison with claim 2 which appears in the application and which was solicited by the patentees, Driggs and Faber, and then cancelled, so that your Honor can compare the scope of the cancelled claim with the scope of claim 1 of the patent in suit, which claim I believe is the broadest.

* * *

The Court: Received into evidence. [20]

* * *

Mr. Miketta: As Defendant's Exhibit D I would like to introduce into evidence the General Rules and Regulations for Vessel Inspection approved by the United States Coast Guard and issued by them, as a matter of fact, dated August, 1943.

* * *

The Court: Received into evidence.

Mr. Miketta: And as Defendant's Exhibit E, the General Rules and Regulations for Vessel Inspection (Ocean and Coastwise) issued in May, 1947.

* * *

The Court: Received into evidence.

* * *

Mr. Miketta: As Defendant's next exhibit, Exhibit F, I would like to introduce copies of all of the prior art patents and publications upon which defendant is relying, [21] with index thereto, constituting Exhibits F-1 to F-32.

* * *

The Court: Received into evidence.

Mr. Miketta: As Defendant's Exhibit G, I would like to introduce into evidence at this time the various admissions made by plaintiff in response to defendant's requests and interrogatories. [22]

* * *

The Court: Very well, the document will be received as Defendant's Exhibit G in evidence. It comprises requests for admissions and the interrogatories and the responses thereto?

Mr. Miketta: That is correct, your Honor. [23]

* * *

DEPOSITION OF ARTHUR F. HUBBARD

[Narrative statements and portions of the Reporter's Transcript of Proceedings designated by the Defendants-Appellants.]

The following narrative statement:

Plaintiff then read into the record a deposition of Arthur F. Hubbard, taken on May 19, 1949, at Columbus, Ohio. Arthur F. Hubbard testified that he resides at Stuart, Florida, and from April 1, 1929, was employed as president of International Flare Signal Company until about 1930, at which time consolidation took place with Kilgore Manufacturing Company; that he had charge of development, manufacture and sale of products sold by International Flare Signal Company. After consolidation, he was vice-president of the Kilgore Manufacturing Company in charge of the International Flare Signal Division until the end of 1945, when he retired.

Hubbard stated that plaintiff's Exhibit No. 5 for identification was a signal cartridge put out by plaintiff, and known as a No. 52 signal when he was with the company. To the best of his recollection manufacture of that signal started around 1934 and no essential changes were made since, although he could not categorically say that there were two gas checks between the signal candle and parachute.

Hubbard stated that both International and Kilgore paid royalties to Driggs and Faber under Patent No. 1,947,834.

The Court: The presumption will be indulged

(Deposition of Arthur F. Hubbard.)

that the court considers only competent evidence.
You may proceed.

* * *

Mr. Schmieding: "Q. Did the International Flare Signal Company or Kilgore sell these flares?

* * *

"A. Many, many thousands of them, yes.

"Q. Do you know to whom they sold them?

"A. Oh, yes. We sold them to the Coast Guard, United [44] States Coast Guard. I think they were one of the first customers we had for this type of flare. We also sold them to the steamship operators and to and through the ship chandlers through the country. Of course the sales to the ship chandlers and to the steamship companies were made after we received approval from the government for our flare."

Mr. Miketta: I objected to that, your Honor, on the ground that there was no foundation laid, not the proper method of proof; and furthermore, on the ground that the question was indefinite and vague, the particular type of flare or the construction of the flare not being identified. The witness subsequently testified that there were a great variety of flares, and therefore the vagueness is apparent.

* * *

Mr. Miketta: Yes, I asked a question of "like." I brought out that point.

"Is it not a fact that there were various styles or types [45] of signal that were manufactured by

(Deposition of Arthur F. Hubbard.)

Kilgore Manufacturing Company and International Flare Signal Company?

“The Witness: Oh, yes.”

That was the basis of my objection, your Honor.

The Court: Yes.

Mr. Miketta: That it was vague and indefinite and it was not a proper method of proof.

The Court: Overruled. [46]

* * *

The following narrative statement:

Hubbard stated that flares “practically identical” to Exhibit 5 were approved by governmental agencies in 1933 or 1934, and that information thereon should be in the Kilgore files. He stated that he had been in the pyrotechnic business since 1921 and prior to Kilgore’s development of a flare like Exhibit 5 the only signal that was a prescribed requirement for lifeboats was a two-minute, scratcher-type hand signal. After Kilgore, in collaboration with the Coast Guard, developed different types of signals and flares for their use, Kilgore thought there may be a market for a signal of this type for lifeboats. Tests were conducted with the Bureau of Marine Inspection and Navigation and they made a requirement that ships of American registry carry an approved pistol and signal flare. Certain functional characteristics were prescribed. The witness said that he doesn’t say that no other signal made differently would not receive approval; in fact, others received approval.

(Deposition of Arthur F. Hubbard.)

Upon cross-examination, Hubbard testified as follows:

Mr. Hann: "By Mr. Miketta:

"Q. How does this Mr. Baack spell his name?

"A. B-a-a-c-k.

* * *

"Q. At the time Mr. Hubbard that you were obtaining approval of a flare, was that a parachute type flare? A. Yes, this is a parachute type.

"Q. You say the Bureau of Marine Inspection and Navigation was the one that issued the approval at that time? [56]

"A. The Board of Supervising Inspectors of the Bureau of Marine Inspection and Navigation.

"Q. They conducted tests? A. Yes, sir.

"Q. You submitted flares to them?

"A. Yes, sir.

"Q. There were some tests on Coast Guard cutters, did you say?

"A. I am sure at least one of the tests was made on Coast Guard Cutters. That was, I believe, in Chesapeake Bay. Another test made out of New York, I think, was made off of commercial tugs out there.

"Q. Was that attended by any of the members of the Bureau?

"A. The entire Board of Supervising Inspectors, so far as I recall.

"Q. They turned in a report on that, and approved your flare? A. They did.

"Q. Did you have to submit to them the details

(Deposition of Arthur F. Hubbard.)

of the construction or specifications of the flares that you were going to manufacture?

“A. We had to provide them with a set of drawings representing the flare that was approved by them, and they signed or sealed that set of drawings. I think we had it in duplicate [57] and it would all be ribbon and the government seals on it.

“Q. You saw copies of the reports that were rendered by the Bureau of Marine Inspection and Navigation and that Board of Supervising engineers? A. I did.

“Q. Are those records and those drawings and copies of them, probably in the Kilgore Manufacturing Company files?

“A. They were up until the time I left the company.”

Mr. Miketta: At that time, your Honor, objection was made “to the hearsay testimony of the witness regarding the approval of an unidentified flare, since it appears that the drawings and specifications as well as the reports of tests were in documentary form and were in the files of the Kilgore Manufacturing or of the International Flare Signal Company at the time that the witness retired in 1945.”

It certainly is not the proper method of proof to rely on such hearsay testimony when positive records of identification are available.

The Court: Overruled. [58]

(Deposition of Arthur F. Hubbard.)

Mr. Hann: "Q. Is it not a fact, Mr. Hubbard, that a good many of the earlier flares that were manufactured and sold by Kilgore Manufacturing Company and International Flare Signal Company, did not include this outstanding flange or lip on the bottom cartridge case or cartridge shell, into which the projectile case is held?

"A. That is true but—not that particular type of signal. We made other types of signals that had the different characteristics you just mentioned?

"Q. The other characteristic I mentioned is the provision of an annular groove in there instead of the flange? A. That is one type. [59]

* * *

"Q. May I rephrase the question, Mr. Hubbard?

"Kilgore did manufacture some sort of a signal flare provided with a cartridge case which had a groove near the base instead of this flange?

"A. They did.

"Q. Is it your contention that they never manufactured a parachute type of flare with that groove in the bottom of the cartridge case?

"A. Oh, they made many thousands of them.

* * *

"Q. When the cartridge case is provided with a flanged bottom, then it is to be used as a breech-loading flare? A. That's correct.

"Q. In a breech-loading gun?

"A. That is right. [60]

(Deposition of Arthur F. Hubbard.)

“Q. When it has the annular groove near the bottom, then it is a muzzle-loading flare?”

“A. That is essentially correct. The only exception I would make to that, one time we did develop a pistol that would receive that one through the annular groove with the breech, but the last——

“Q. You did sell parachute type flares provided with a cartridge case in the bottom having a groove in it?”

“A. Not a cartridge case at the bottom. The only one that I can recall was a cartridge case that completely enclosed the projectile case instead of that short cartridge case that is shown there. The projectile case, however, that of that one you are bringing into the picture, is identical with that one there.

“Q. In other words, the projectile shell or case with its contents was the same whether you had a cartridge case bottom on it provided with a flange or with an annular groove?”

“A. Except in the, perhaps the case of sales made to the United States Government, where we had to abide by their drawings and specifications. There there may have been some minor changes, but essentially it was the same thing.

“Q. Those drawings and specifications were not enforced until about 1934 and 1935, is that correct?”

“A. Well, I would say at that time, until we received [61] the approval from the United States Department of Commerce, that is the Bureau of Marine Inspection and Navigation, that there were

(Deposition of Arthur F. Hubbard.)

no government specifications in force or otherwise in effect.

“Q. What were those specifications to which you had to abide, Mr. Hubbard?

“A. In what respect—the one with the annular groove, or this one?

“Q. You mentioned specifications that you had to conform to. I am trying to find out what specifications you have in mind?

“A. I have in mind the specifications that would be involved by that particular type of signal, that was approved by the Bureau of Marine Inspection and Navigation for use on commercial steamships.

“Mr. Schmieding: The witness points to Exhibit 5.

“Q. What were those specifications?

“A. Well, in our particular case, they applied only to the drawings that represented the type of signal that was approved by the Bureau. Subsequently other people came in with other types of signals that possessed essentially the same functional requirements as far as the specifications that were set down by the Bureau were concerned, and I presume that they had to have their drawings approved by the Bureau the same way that we did.” [62]

* * *

Mr. Hann: “Q. Were those specifications in writing at that time?

“A. The regulations at the time of the approval as I recall, the requirements involved, were not

(Deposition of Arthur F. Hubbard.)

specifications governing the manufacture of the signal. They were merely performance specifications that were involved.

“Q. Were those specifications in writing?

“A. Yes, they were made a part of the regulations.

“Q. They are probably still in the files of the Kilgore Company?

“A. Yes. As a matter of fact, they are published all the time in different government digests.”

Mr. Miketta: I move to strike the witness' testimony as to his conclusions and opinions as not the proper method of proof, since the documents themselves should be adduced in evidence if they are to be relied upon by the plaintiff. [63]

* * *

Mr. Miketta: I was developing the fact if there were documents in existence, so as to give me basis for the motion to strike what appears on page 12, line 26, to page 15, line 25, adduced during the direct examination.

The Court: The motion is denied.

Mr. Hann: “Q. I understand you to say Mr. Hubbard, that before the Kilgore Manufacturing Company and Messrs. Driggs and Faber made the invention of the patent in suit No. 1947834, the only prior signal used in marine work was this, as you call it, a scratch type?

“A. Hand type of signal. [64]

* * *

(Deposition of Arthur F. Hubbard.)

“Q. But it would not eject any signal to any height?

“A. That is correct. There were signals manufactured at that time, prior to that time, that could be projected, but not the parachute type of signal. In World War I there was what they called the Very Pistol; you shoot a star in the air.

“Q. You are familiar with the Very Pistol and the star shells?

“A. Star shells were not pistol operated.

“Q. It is your contention that there were no parachute type flares prior to the invention allegedly made by Driggs and Faber in the patent in suit?

“A. No; I don't say that, but they had never been offered commercially. There were parachute signals made prior to that time of a sort. [65]

* * *

“Q. Incidentally, how long is the flare candle of the flares manufactured by Kilgore? [66]

“A. Of that type?

“Q. Yes.

“A. I couldn't tell you from memory, sir.

“Q. Has it ever varied in size?

“A. On that type of signal?

“Q. Yes, on a parachute type of flare.

“A. Well, there are many different types of parachute signals and parachute flares, probably a dozen or more different kinds. They make para-

(Deposition of Arthur F. Hubbard.)

chute flares, or made parachute flares that were maybe 30 or 36 inches in length." [67]

* * *

The following narrative statement:

Hubbard also testified that parachutes were made of Japanese or domestic paper and the size of the parachute influences the rate at which a burning flare will descend; that a parachute must be balanced with the rest of the item to minimize oscillation or swinging, which may spill air out of the parachute and cause rapid descent. The proper length, diameter and pyrotechnic composition is required to give the functional burning characteristics required by Government regulations.

* * *

"Q. Do you know—incidentally, I will just ask you this question—do you know whether the patent in suit describes or gives the composition to be used in the flare itself, in the flare candle itself?

"A. It doesn't give the specification for the composition. I am quite sure of that.

"Q. It doesn't tell you what ingredients to use?

"A. No, I don't think so, as I recall it.

* * *

"Q. Let me rephrase it.

"Is it not a fact that the outside diameter of the projectile case or shell of a flare such as Exhibit No. 5 here before us, is actually determined and established by the government specifications on the pistol which may be used?

"A. That would be a limiting factor. [71]

(Deposition of Arthur F. Hubbard.)

“Q. You can't make it any bigger than the bore?

“A. Of the approved pistol.

“Q. Similarly, the approved pistol specifications call for a certain chamber bore which establishes the maximum diameter of the cartridge case used in the flare such as Exhibit 5?

“A. That is correct.

“Q. And the two most important elements in the flare as far as length are concerned, are the candle and the space occupied by the parachute, isn't that correct?

“A. That is correct, but there is no definite—not necessarily any limitation on the length of your projectile. You can have that sticking out the muzzle of the pistol six inches if you wanted to.

* * *

“Q. That height to which the projectile case or shell is ejected, depends upon the charge which is placed in between the cartridge, bottom of the cartridge case, and the bottom of the projectile shell?

“A. Largely.

“Q. What other factor influences that?

“A. The weight and the balance of your projectile [72] case. If it tumbles excessively on the way up you are apt to cut down your height of projection. If there is a bad fit in it, improper fit in the pistol that allows excessive gas leakage, you are apt to get some reduction in the height of projection, but essentially it is the propelling charge in the base of the cartridge case.

(Deposition of Arthur F. Hubbard.)

“Q. In other words, the amount and the character of the powder?

“A. Oh, yes, the character of the powder in there is a very definite factor. Smaller grains have different factors than larger grains. [73]

* * *

“Q. Did you ever make any sales personally to this man Baack?

“A. I didn't make the sales to Billy Baack. I made them to Mr. Becherer who is president of the Coston Supply Company; many, many thousands of them.

“Q. Are records kept of those sales by the Kilgore [75] Manufacturing Company?

“A. Oh, yes; they were up to the time I left the company.

“Q. That is true of all sales then?

“A. That's right.” [76]

* * *

The following narrative statement:

Hubbard identified plaintiff's Exhibit 7 as a No. 52 red parachute signal and stated that the number was based upon Supplement 52 of the Regulations of the Bureau of Marine Inspection and Navigation; that Kilgore uses about thirty to forty different numbers to identify different flares.

Hubbard testified that sales records at Kilgore were under his subordinate, but that Hubbard had knowledge of sales since the company had no salesmen up to the time he left the company and all trade contacts were made by him.

DEPOSITION OF GEORGE N. HATCH

[Narrative statements and portions of Reporter's Transcript of Proceedings designated by the Defendants-Appellants.]

Deposition of George N. Hatch, taken May 19, 1949, at Columbus, Ohio, was read into the record. Hatch testified that he has been in the employ of Kilgore Manufacturing Company since September 15, 1945, as sales manager of International Flare Signal Division. Previously Hatch had been an inspector of ordnance material for the War Department and a field representative on the Bomb and Pyrotechnic Branch. In 1943 he visited Kilgore and International and was not particularly interested in signal flares and therefore could not say that plaintiff's Exhibit 5 was identical to what he saw at the Tipp City plant in 1943. To his personal knowledge, flares like Exhibit 5 have been manufactured since 1946, when their sale came under his jurisdiction. Some changes in manufacture had been made since 1946; that in 1948 a new specification issued requiring use of sealing composition between the projectile and shell casing, a coat of lacquer on the top and placement of each signal in an individual bag.

Hatch read a list of names of companies taken from Kilgore shipping records to whom No. 52 flares had been shipped during 1944, 1945 and 1946; he testified that approximately 6,000 dozen flares were sold in 1944 and 1945; and 1,619½ dozen in 1946.

(Deposition of George N. Hatch.)

The 1946 list was taken from invoices by a billing clerk.

* * *

Mr. Miketta: "Mr. Miketta: The testimony of this [93] witness regarding the alleged sales is objected to as not the proper method of proof. The original records speak for themselves."

* * *

The Court: I will overrule the objection at this time. [94]

* * *

The following narrative statement:

Hatch testified that there are standard specifications and blueprints followed by the manufacturing department of Kilgore for each of the variously numbered flares, giving instructions as to type of flare, composition to be employed, type of expelling charge, etc.

* * *

Mr. Miketta: "Now, to the best of your present recollection was the 1943 No. 52 signal flare identical to Exhibit 5?

"A. I can't answer that question because of this reason, that in 1943 when I visited the Tipp City plant of the Kilgore Manufacturing Company for the International Flare [103] signal division, I was not particularly interested in this unit from my official standpoint. I was interested in it purely out of curiosity. I would say that from looking at Exhibit No. 5 and comparing Exhibit No. 5 with what I observed in Tipp City in 1943, it is just

(Deposition of George N. Hatch.)

about identical. Now, I couldn't say that it is absolutely identical."

The Court: Is that "no" or "now"?

Mr. Hann: "No." Change it to "no." [104]

* * *

CHARLES SCHNEIDER

called as a witness under Rule 43(b) of the Federal Rules of Civil Procedure, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, please?

The Witness: Charles Schneider.

Direct Examination

By Mr. Schmieding:

Q. Mr. Schneider, you are the defendant in this cause of action? A. Yes. [139]

* * *

I ask this certified copy of United States Coast Guard as to tests on parachute flares, sheets 1, 2, 3, and 4, be marked for identification Plaintiff's Exhibit No. 26.

* * *

Mr. Miketta: There is, your Honor. In the first place, those tests are not properly certified. Secondly, they relate to tests which were carried out after the filing of the action here. I do not see that they are pertinent. Either the plaintiff has a cause of action for acts of the defendant after July 7th and prior to October 16, 1947, or they have not. [145]

* * *

(Testimony of Charles Schneider.)

Mr. Schmieding: The tests are required by the Coast Guard in order to obtain the Coast Guard's approval. All life signals of this type must be approved by the Coast Guard, and Coast Guard at times pick up at random flares from each manufacturer and they make a test on those flares and see whether they meet certain specifications that are required. [147]

* * *

Mr. Schmieding: I would like to have marked for identification a certified copy of a paper of the U. S. Coast Guard dated May 2, 1949, the title of it is: "Subject: faulty pistol projected parachute red flare distress signals manufactured under Coast Guard approval No. 160.024/5/0 by Signal Manufacturing Company, Los Angeles, California." I would like to have it marked for identification.

* * *

Mr. Schmieding: I offer in evidence this paper as Plaintiff's Exhibit No. 27.

The Court: Is there objection?

Mr. Miketta: There is an objection to that, your Honor, on the ground that it pertains to matters subsequent to the filing of the complaint in this action, in the first place. Secondly, that it is not a complete story. There was a subsequent bulletin issued which showed that the difficulty lay in the pistols, some of which were manufactured by the Kilgore Company, the plaintiff herein.

The Court: That would go to the weight of it, would it [150] not?

(Testimony of Charles Schneider.)

Mr. Miketta: That is correct, your Honor. My primary point is that these are acts after the filing of the complaint, and therefore cannot be used to predicate a cause of action going back to 1947.

The Court: The objection is overruled. Exhibit 27, for identification is received in evidence.

* * *

Cross-Examination

By Mr. Miketta:

* * *

Q. But the aluminum projectile cases and the aluminum base caps are manufactured for you by the Aluminum Company of America, is that correct?

A. That is correct.

Q. Can you produce the cap and a case which is made for you and used by you in the manufacture of flares?

A. That's correct. [151]

* * *

Mr. Miketta: The H-A for the projectile case, your Honor, and the H-B for the base cap.

The Court: By base cap you are referring to the cartridge case?

Mr. Miketta: Yes.

* * *

The Court: Received in evidence, Exhibits H-A and H-B, for identification, received in evidence.

Q. (By Mr. Miketta): The projectile case, Exhibit H-A, is in a partly covered form and includes a delay fuse eyelet and a gas check or washer, is that correct?

A. Yes, sir.

(Testimony of Charles Schneider.)

Q. And that is the way it is used in your flares?

A. Yes, sir.

Q. And the shoulder of that eyelet which contains the delay fuse does not rest against the bottom of that projectile case, but instead rests against the washer, is that correct?

A. Yes, sir. [152]

Q. And the base cap or cartridge is also in a partly manufactured form in that it includes the—what do you call that, the primer?

A. Cap.

Q. The firing cap itself?

A. I believe that is what they call it.

Q. And after whatever ejection charge is placed into the base cap, then the bottom portion of the projectile case, Exhibit H-A, is forced with a press fit into the cartridge case?

A. I believe that is the way it is done.

Q. Thank you. With reference to Plaintiff's Exhibit 27, which is this bulletin dated May 2, 1949, regarding faulty parachute distress signals, will you please tell us what actually transpired and whether or not that bulletin was superseded by a subsequent bulletin?

A. As to the first part, we were told that some of the flares had been returned because they were supposed to be faulty, and of course since they went through our inspection before they were shipped out it seemed unlikely, although such a thing could be possible, I suppose, so I went down to San Pedro in one case, and I brought along some gauges, chamber gauge and plug gauge, and at once, as soon

(Testimony of Charles Schneider.)

as I tried some—and also some of our pistols—and I tried the flares and found that they were not the flares, but that [153] the pistols were at fault.

Q. Why were the pistols faulty?

A. In one case there was a little nick that required no more than about a thousandth of an inch to prevent the flare from going in properly, there was a nick in the pistol, the pistol might have been handled carelessly, I don't know how it got the nick in it, because as soon as we put it in our pistol it fit, it was a new pistol that hadn't been handled. Then by using the gauges we found in that case, the first case, that it was the pistol at fault and not the flares. I went aboard with the Coast Guard inspector so that I would have the advantage of other opinion than mine. When the pistols were replaced they had no trouble, they kept the flares. That happened very quickly in about two or three—four, in fact, other occasions at San Pedro. Having had this first experience, I came prepared in the others. In one case the pistol was fouled, and in another case the dimensions were just simply faulty. There was nothing the matter with the pistol, it was a new pistol, but it wasn't made right, or something, because the dimensions were too small for a proper flare.

Q. Whose make pistol was that?

A. They were various makes. As I recall it—I have correspondence here if you want me to refer to it. One was Sedgley, and several of them were at least on two or [154] three occasions involving

(Testimony of Charles Schneider.)

about five or six pistols, they were International. There was a Sedgley and a Columbia and—there were several Columbias. Columbia pistols are no longer made. Approval has been withdrawn. There were several of those.

Q. In other words, all this difficulty was because either the pistol was improperly machined or had corroded, or something else was wrong with it, is that correct?

A. That is correct. [155]

* * *

The Court: Exhibit 26 for identification is received into evidence. How often are these tests made, gentlemen?

* * *

The Witness: Whenever there is a lot manufactured.

The Court: In other words, every lot produced are sampled and tested, is that correct?

The Witness: That is correct. The Coast Guard requirements are that a certain number of flares are taken at random by the inspector out of a lot, that is, all manufactured, before they are shipped. So it is his duty to go into the lot and take these at random, a certain number of them.

Q. (By Mr. Miketta): Just to review this, may I ask a question here? In the course of these tests, Mr. Schneider, are we correct in this: The Coast Guard inspector takes these [157] grab samples out of a lot and then they fire them in a standard pistol

(Testimony of Charles Schneider.)

upwardly; they measure the altitude to which the flare has been projected; they measure the rate at which the parachute and its ignited flare drop; they determine the rate of descent that way; they observe whether the flare broke in half or something else happened to it, and time the length of burning while it is floating down; is that correct?

A. That is substantially correct. There are other—I will have to wait for a question.

Q. In addition to that, they also take samples of the candle itself and subject it to photo-metric tests to make certain that the color and the intensity of the light meets their specifications as published in their bulletins? A. That is correct.

Q. Is that correct? A. That is correct.

Q. And unless that particular set of grab samples has met their approval, they will not permit that shipment to go out, is that correct?

A. That is correct. If it is less than a minimum that they allow, they will reject the entire lot. [158]

* * *

Q. (By Mr. Miketta): And, of course, the same procedure as far as inspection and grabbing and scoring is concerned is carried out in every manufacturer's plant who manufactures flares of this type, is that correct?

A. I believe that is right. It should be. Yes, it is right. It applies to everyone the same.

The Court: How many manufacturers are there that you know of in the manufacture of this same type of flares?

(Testimony of Charles Schneider.)

The Witness: Flares—as far as I know, there are only two at the present time. [159]

The Court: Your company and the plaintiff here?

The Witness: That is correct.

* * *

Q. To your knowledge, what, you may say, percentage of your production within the past year has passed the Coast Guard inspection?

A. We have never had a lot, an entire lot, rejected. The percentage, scoring percentage, has been lately a hundred per cent and in some cases down around 99, but lately, though, they have been 100 per cent. [160]

* * *

Q. When was the last time you had a batch rejected?

* * *

A. We never had a batch rejected.

* * *

Q. (By Mr. Miketta): Now referring again to this Exhibit 27 and the faulty pistols, was there a subsequent bulletin published by the Coast Guard under the signature of J. F. Farley, Admiral of the U. S. Coast Guard? A. Yes, there was.

* * *

Mr. Miketta: May we have that marked for identification, please, as Defendants' Exhibit I.

* * *

The Court: Is Exhibit I for identification offered into evidence?

(Testimony of Charles Schneider.)

Mr. Miketta: Yes, your Honor.

* * *

The Court: Received in evidence. [161]

* * *

Q. And are we correct in this that the Coast Guard makes their inspections of the ship's complement and after a [163] pre-determined period of time, if they find flares on board which have been there for more than a given length of time, the ship owner is required to discard those and buy new ones? A. That is correct.

Q. And what is that period of time, do you know?

A. At the present time I believe it is three years. [164]

* * *

Mr. Schmieding: I would like to call Dr. Clauser.

HERBERT C. CLAUSER

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows: [167]

* * *

The following narrative statement:

Clauser testified he is Director of Research and Development for Kilgore Manufacturing Company and in their employ since 1938. In 1924 he was chief chemist of Triumph Explosives Company at Elkton, Maryland, and stayed there till 1938. A parachute-type flare which met Coast Guard specifications was

(Testimony of Herbert C. Clauser.)

developed by Triumph Explosives and manufactured by it.

The Court: You would stipulate for the purpose of this case that Exhibit 3, for identification, and Exhibit 25, for identification, are defendants' flares or portions of them?

Mr. Miketta: That's right, your Honor, and the parts there found or shown were found by the witness. [173]

* * *

The Court: Plaintiff's Exhibits 3 and 25, for identification, are received in evidence.

Mr. Schmieding: Will you mark for identification as Plaintiff's Exhibit No. 28 this item?

Perhaps, your Honor, Mr. Miketta will stipulate to the fact that this also is a flare cut-away, but showing plaintiff's construction. [174]

* * *

The Court: Is that a longitudinal cross-section of a type of flare or signal currently being manufactured by the plaintiff in this action?

The Witness: Yes, sir.

* * *

The Court: Exhibit 28, for identification, is received in evidence. [175]

* * *

Q. (By Mr. Schmieding): Dr. Clauser, could you tell us the advantages, if any, of a projectile made of a one piece of drawn metal such as that shown in the patent?

* * *

(Testimony of Herbert C. Clauser.)

A. That is one of the things that has puzzled the other fellow for a number of years. That included myself. They are a specific advantage. First, it is light in weight. It is one-piece in construction of one of the lightest metals known. It is that part of the flare which is projected into the air at 150 feet or more, and it is projected with powder. It rests on the cartridge base which has powder in it which is ignited by a cap, and it is the force created by the burning of the powder that propels it. Now, that is in a state of confinement there and because it is wedged in there, because of the confinement that it has there, that pressure as it develops, it develops instantaneously, it will grow and [180] grow until something will give. Now, that one-piece construction there which cuts down the possibility of crevices, of any leakages and all that. For that reason it is an advantage. That one piece there, it is definitely the most fool-proof mechanical structure that we know of at this time, that is, for an item of that kind, in that there is no possibility, or there is a limited possibility for prematures. If that spit of that expelling charge gets by the delay or by the base, if it is a two-piece projectile, it will be premature and the whole business will explode right over your head and fall back on your body or in the boat and you have no signal. That is, it is exceedingly difficult to handle that, and, as a one-piece construction, over my years of experience I find definitely that, regardless, to be the very best construction for that purpose.

(Testimony of Herbert C. Clauser.)

Q. You spoke of "premature." What do you mean, Doctor, the premature explosion of the black powder 6 in the projectile?

A. In the projectile, yes, sir. The fire will blow the powder, that is, it will get in, it will get by the delay, that is, or any crevice. That must be absolutely fool-proof. It must be so arranged that a spit of fire or a spark of fire cannot go in, even under conditions of high pressure, because it will then ignite the expelling charge of the projectile prematurely. [181]

Q. You spoke about a crevice. What do you mean by that, Doctor?

A. I mean an opening through which a spark or powder can pass. You could have that, say, for instance, you would have welded a piece on the bottom there or put a plug in there with glue or your aperture would be poorly machined. That is just simply an aperture due to faulty mechanics or construction which would permit the passage of a spark.

Q. Has that integral projectile any advantage with respect to the black powder 6? And that also explodes, does it not, to eject the candle and the parachute?

* * *

A. I have already pointed out that because of its construction, that is, the projectile being lodged into that there cartridge case, wedged in there, and just as soon as that priming cap, igniting cap—more correctly called a percussion cap—functions,

(Testimony of Herbert C. Clauser.)

the powder explodes, and the moment of its explosion or what we call the initial impulse is terrific until something occurs, until more space, until you get more volume, until you get the equivalent of a chamber in there. So because of that terrific pressure, it is directly [182] under that delay, properly called a fuse, that takes a beating there and unless that is properly located there and properly anchored, why, that terrific pressure can blow right through the delay and cause a premature that way by blowing the delay right into the powder of the explosion charge.

The Court: What ignites the black powder in the projectile?

The Witness: In the projectile the black powder, the delay, sir.

The Court: With a fuse, the black powder?

The Witness: Yes, a fuse or delay.

The Court: What ignites the fuse, now?

The Witness: The fuse is ignited, that is, by the original explosion charge in the cartridge base.

The Court: Is that fuse so constructed—

The Witness: It burns very slowly.

The Court: It takes time to burn during the ascent of the projectile, is that it?

The Witness: There are two acts occur at the time of the explosion. One is to lift it up in the air and it is burning while it is going up, and it is presumed that the burning is completed when it reaches zenith. It is so timed.

Q. (By Mr. Schmieding): The fuse you are

(Testimony of Herbert C. Clauser.)

talking about is what is referred to in the patent as the eyelet 4 containing the black powder? [183]

A. Yes, sir.

* * *

Q. Doctor, after this projectile is in the air, the black powder 6 explodes to eject the flare and the parachute, that is correct? Is that right?

A. Yes, sir.

Q. Now, has the one-piece construction of the projectile any advantage at that time, at the time that the black powder 6 explodes?

* * *

A. That has relatively thin walls and heavier base, and when the powder, after the fire gets through, the delay or fuse gets into the powder, why, you again have that there same initial impulse of the explosion, so the walls of that tube—the walls of that tube, that is, we do know when you have a one-piece construction that is of the minimum weight, with weights being equal, that that has more strength. And also, in order to guard against that, why, there is an annulus ring that can be made of either wood or paper in the bottom which receives the powder. The purpose of that is to act as a cushion and in part prevent the possible mutilation, that is, of the blowing out or distorting of that there signal case. [184]

Q. You are referring to the wooden spacer 7?

A. Yes, sir.

Q. That annulus, is that what you mean by the ring?

A. Yes, sir.

(Testimony of Herbert C. Clauser.)

Q. And that acts as a shock-absorber?

A. It acts as a shock-absorber, yes, sir; and it also does this, it acts as a spacer in as far as locating the flare is concerned and it also acts as a spacer as far as bringing the powder which does the final expelling into close proximity with your fuse or delay.

Q. Is it, then, the combination of this wooden spacer and the integral wall that prevents rupture of the projectile, the thin wall projectile case, is that what you understand?

* * *

A. Yes, sir, that is what I mean.

Q. And also, this wooden spacer limits the quantity of powder that can be contained within this lower area of the projectile case?

A. Yes, sir. And again, you can see that it is essential that that work be done limited to the minimum amount of powder to prevent mutilation. Yes, sir.

Q. This drawing shows black powder surrounding the left end of the fuse. Is there any advantage to that, Doctor? [185]

* * *

A. Well, the advantage there is sure fire; that is, it is a very tricky proposition to have a fuse or a delay that goes in there that is to do the igniting at all times, that is, to ignite at all times, unless it is properly constructed. [186]

* * *

(Testimony of Herbert C. Clauser.)

Q. (By Mr. Schmieding): Doctor, I notice that the left end of the eyelet 3, the fuse is reduced; is there any advantage to reducing that end of the fuse?

* * *

A. That is very, very important, because at the time at which the propulsion takes place, that is in the gun, as the cartridge—wait a moment. As this here powder——

Q. Black powder 35?

A. Black powder 35, yes, sir, at the time at which that explodes, as has already been pointed out, there is a terrific initial pressure exerted, that is on that fuse directly above it, and by having that fuse in there housed in the manner in which it is, and having it restricted by those elongated ends in there, it prevents, it keeps the force from the powder at the bottom from blowing right through and shooting before the projectile is lifted up to zenith.

The Court: What is that fuse composed of?

The Witness: It is an eyelet, brass or copper, brass primarily, but the composition within, your Honor, that is black powder compressed at a high pressure, with the addition of a little bit of wax to act as a binder, a very small percentage.

The Court: At the base of that fuse, that, is the end [187] which opens, if it does open, into the cartridge case, is the powder in that exposed, is that an open end?

The Witness: That is an open end, yes, sir.

(Testimony of Herbert C. Clauser.)

The Court: And when the black powder 35 is ignited by the firing cap 36, then the igniting of that black powder 35, in turn, ignites the powder in the fuse?

The Witness: That's correct, the expulsion and ignition take place simultaneously.

The Court: The gases eject the projectile?

The Witness: Yes.

Q. (By Mr. Schmieding): If you didn't have that restriction as shown in the patent, the explosion would blow the fuse powder out of the eyelet and cause pre-ignition of the black powder 6 in the projectile shell?

A. Yes, your projectile would not be catapulted to zenith. That is, in a case like that if it were premature the projectile case would stay in position, it would just blow the contents out.

Q. The flare in the parachute? A. Yes.

Q. And that would be dangerous in a boat?

A. Very dangerous in a boat.

Q. I notice in Plaintiff's structure shown in Exhibit 22 there is a felt cushion interposed between the back of the base of the projectile shell and the powder. That is not [188] shown in the patent, is that right? A. That is correct.

Q. Also, I notice that in the structure used by plaintiffs there are two felt washers interposed between the parachute and the flare, is that correct?

A. Yes, sir.

Q. And at the extreme left end instead of employing a closure member 24 like that shown in the

(Testimony of Herbert C. Clauser.)

patent, you use a red lacquer seal, is that correct?

A. That's correct.

* * *

Q Will you explain whether or not the wooden thrust column 21 has any utility in this particular flare?

A. Yes, sir. In order to get a full score of function, if the parachute gets fouled, fails to open, why, you deduct, you will be penalized for failure of the parachute to open after you get it up to zenith and get it lighted, so that is a so-called thrust member that is put in there to prevent the force of expelling that expulsion which occurs when the candle is lighted and throws the parachute out there, it is put in there for the purpose of preventing the paper chute from being crushed, being wadded in there, it is to communicate [189] the thrust of the last expulsion to the top without crushing the parachute, which would make it difficult for the parachute to open.

Q. Then, the thrust isn't taken by the parachute at all, it is taken by the thrust member?

A. That is it exactly.

Q. Then there is a wire connected to the flare and the parachute, is that correct?

A. That's correct.

Q. And it is looped around the felt washer 17?

A. That's correct.

Q. Both the patented structure and Kilgore structure employs a flange at the right end of the eyelet 3, is that correct?

(Testimony of Herbert C. Clauser.)

A. That's correct

Q. And does that flange rest upon the base in the plaintiff's structure? Does it rest upon the base of the projectile shell?

A. If I get your question correctly, there is a washer interposed there, washer between. [190]

* * *

The Court: Is there any issue about it?

It seems perfectly obvious to me, gentlemen, that the felt there is a cushion between the wooden part and the base of the projectile. I assume it performs the function of absorbing shock. Is that what it is for, Doctor?

The Witness: Yes, for shock. It is a combination. It is just a logical thing to put there when you have action like that, for more than one reason. [191]

* * *

Q. Dr. Clauser, is it necessary to limit the projectile case to perform the functions that this particular flare performs? I mean is it necessary to limit the length of the projectile case to what Kilgore's length is?

A. No, sir, it is not necessary. A flare can be made to meet the same functional requirements by making it somewhat shorter, making it somewhat longer, or vice versa

* * *

A. The functional requirement from a burning standpoint is 30 seconds, and the flare case into which the composition is compressed, the powder

(Testimony of Herbert C. Clauser.)

is compressed there at a high pressure for the sake of slowing the rate of burning. In the open it would explode, it would go almost spontaneously. So by the variation of that pressure—that is, the same amount of material in the same case, by increasing the pressure you will get a lesser volume, in other words, instead of having a flare case that is three inches long, you can reduce it, to be specific, as much as three-quarters of an inch, and get enough composition in there of this type which will give you in excess of 20,000 candlepower and it will burn in [195] excess of 30 seconds, and it is obvious that if that flare case is shortened that you can shorten the whole structure.

Q. That is without changing the cylindrical diameter?

A. Without any change to the cylindrical diameter at all. [196]

* * *

The Court: The burning portion of the flare, then, could be more highly compressed by mechanical pressure by thus confining it in a smaller space?

The Witness: Yes; by doing that you burn it more slowly. [198]

* * *

Cross-Examination

By Mr. Miketta:

Q. Dr. Clauser, during your academic training, in addition to the study of chemistry you unquestionably studied physics, did you not?

(Testimony of Herbert C. Clauser.)

A. Yes, sir, I taught physics for two years.

Q. Among the subjects embraced by your study of physics were acceleration, compressibility of fluids, ballistics, probably, the force of gravity, things of that sort, is that correct?

A. Some of those came in. That is not all of them.

Q. Probably in your engineering training, also, you had occasion to study the strength of materials, the yield strength and the ultimate strength, and the elongation of various metals and alloys, is that correct?

A. Some of that, yes, sir.

Q. The fabrication of these metals by machining and drawing, you are familiar with those things, are you not?

A. Oh, yes.

Q. Of course, you specialized in chemistry, and therefore you studied and are thoroughly familiar with black powders and primers and detonators and propellants and oxidation and reduction effects and the burning rates and the volume of gases generated, and things of that sort, are you not? [214]

A. Yes, sir.

* * *

Q. Prior to your association with the plaintiff here you were with the Triumph Explosives Company from 1924 as their chief chemist, apparently, and Triumph made parachute flares during that period of time, did they not?

A. Yes, sir, lots of them

Q. And in view of the fact that you were with the research group at the Army Arsenal at Pica-

(Testimony of Herbert C. Clauser.)

tinny, you are probably familiar with the publications of the government relating to pyrotechnics as used in the war, particularly War I, among them the history of military pyrotechnics of the World War, published in 1920 by the United States Ordnance Department, are you not?

A. Yes, I was associated with the author that wrote that.

* * *

A. I did not have anything to do with the writing of the books. I said I merely was associated with him after he had written them.

Q. You are familiar with the subject matter there [215] discussed? A. Yes.

Q. And we are correct in our knowledge that parachute type flares were shot from pistols like the Very pistol and the Webley-Scott during the first World War, were they not?

A. To a limited extent only. That is where you are referring to the Very pistol, Mr. Miketta, it was used primarily for the shooting of a star, and the use of the 25 millimeter pistol, which was a star pistol, did not come into use until the World War was practically ended. But it is safe to say that probably some of them were used, not to a great extent.

Q. I am not trying to pin you down to a specific date, Doctor Clauser. Let us say that prior to 1926, which is considerably after the war, there had been descriptions made and actually both 25 and 35 millimeter pistols with parachute type

(Testimony of Herbert C. Clauser.)

flares had been made and tested, and whether they had been used during the war or not is immaterial, but they had been in existence and tested in this country, isn't that correct?

A. I would qualify that, if you increase that calibre. I know that came as a development of the experiences that they had with the 25 millimeter.

Q. Prior to 1926 we had parachute type flares shot from pistols? [216]

A. From a 25 millimeter, which is approximately a 10-gauge shell.

Q. And 35 millimeter, which is approximately 1.4 inches?

A. Yes, sir, as early as that, that was a demand that came out of the use of the smaller pistol, because of the fact that they were not able to get sufficient burning time and sufficient candlepower using a gun of that calibre.

Q. Speaking of burning time, certainly prior to 1929, in view of your experience you could compound or mix a pyrotechnic composition, let's call it that, that would burn red and would give a desired brilliance or candlepower, and would have a burning time of either 10 seconds, 30 seconds, or a minute, if you wanted to have it burn that long, isn't that correct?

* * *

A. We could make compositions that burn that time, the various colors, put them in different cases, adapt the composition and the computation of the formula, adapt them to the containers, yes, sir.

(Testimony of Herbert C. Clauser.)

Q. Prior to 1929 you knew that if you took your pyrotechnic composition and you made a very loose pile of it it [217] would have a very high rate of burning and might even explode, isn't that correct?

A. That is correct, sir.

Q. And if you compressed that same composition you could make it burn more slowly, isn't that correct?

A. That is correct. [218]

* * *

Q. It wouldn't make a bit of difference whether you hung your candle in the hearth of your photometric set-up in your laboratory, or whether you had it standing here on the table, they would still burn for the same length of time?

A. That is correct. [219]

* * *

Q. I am not trying to trap you; I am just trying to get general statements here. In the pyrotechnic art it is customary to use relatively slow-burning powders to act as propellants, is it not?

A. Propellants, generally speaking, are black powder in some form or another. [220]

* * *

Q. But the effective value of a propellant is varied by the grain size of the powder, is it not?

A. Somewhat, yes, sir.

Q. And it is also varied by the composition of that black powder, because you can vary the composition of a black powder, can you not?

A. Yes, sir, by varying the composition, that is,

(Testimony of Herbert C. Clauser.)

by varying the ingredients that enter into the composition.

Q. And prior to 1929 these variables and these compositions were well known, were they not?

A. Yes, sir, that is right.

Q. Doctor, do you know to what height the Very lights, either the 25 or 35 millimeter and the parachute flares that were fired from the Very and the Webley-Scott pistols—do you know to what height they would go?

A. Do you mean the stars, that is, the star form?

Q. The parachute signals, the parachute flares?

A. Oh, it would depend entirely in what position you hold the gun. If you hold it an angle or hold it vertically.

Q. Let us assume they were held vertically.

A. If you shoot it at a vertical distance, it will go higher than that of a parachute flare.

The Court: That is, higher than 150 feet?

The Witness: Yes, sir, it will. If you shoot merely a star, it has been virtually compressed and made to play the part [221] of a bullet. You are virtually making a bullet out of pyrotechnic composition, and that shot in a 25 millimeter pistol, if it is shot erect, would go higher than the projectile, that is, of a 37 millimeter distress signal with a parachute in it.

The Court: You are referring now when you speak of distress signals to flares such as involved in this case?

(Testimony of Herbert C. Clauser.)

The Witness: That is correct, your [222]
Honor.

* * *

Q. The burning time of this particular candle that we are contemplating, let us say we are contemplating a particular candle, the burning time of that candle is not influenced in any way by whether the projectile case from which it was ejected was made of metal or brass or aluminum or, let us say, synthetic plastic or heavy cardboard, is it?

A. That is, the container from which it was ejected has no influence?

Q. That is correct.

A. That is correct. [223]

* * *

The Court: But counsel's question is as to the case in which it is, whether it is an aluminum case or something else, or one-piece or a two-piece case, that does not have anything to do with the burning time?

The Witness: No, sir.

The Court: I think that is pretty obvious. It would be a great burden on the other side to convince me that it did. [225] Let us not take up any more time with that. The witness has described what he views to be the advantageous features of the single-piece projectile shell. [226]

* * *

The Court: I understood the plaintiff's claim was a combination of old elements to produce a better result. Isn't that the essence of plaintiff's claim?

(Testimony of Herbert C. Clauser.)

Mr. Schmieding: Yes. [227]

* * *

The Court: You do not need to argue it. I just want your position. Do you claim that there is anything about this invention that is new except the combination of elements?

Mr. Schmieding: Yes, we do, your Honor.

The Court: What is it?

Mr. Schmieding: We claim there is something new in the shape of this particular eyelet.

The Court: You mean there has never been an eyelet shaped that way before?

Mr. Schmieding: There never has been an eyelet shaped that way before. Eyelets are old. We will admit that eyelets are old.

The Court: And tapered eyelets are old, aren't they?

Mr. Schmieding: Dome-shaped eyelets, but, as Dr. Clauser pointed out, they do not function the same as this tapered eyelet with the elongated restriction.

The Court: But the device itself, an eyelet tapers to a smaller aperture at one end than at the other end, is old, isn't it?

Mr. Schmieding: Not tapered. A dome with a small hole.

The Court: However it does?

Mr. Schmieding: Oh, yes, that is so.

The Court: It is smaller at one end than it is at the [229] other, isn't it? That is all that eyelet is, isn't it?

(Testimony of Herbert C. Clauser.)

Mr. Schmieding: That is right.

The Court: It is old, isn't it?

Mr. Schmieding: That is right. [230]

* * *

Q. (By Mr. Miketta): If instead of a taper, that had been partly rounded, Dr. Clauser, would not the pressure of the gases within the cartridge base acting on that plug or delay fuse composition also be prevented from blowing through the aperture by the fact that you did have a half round or curved surface instead of a tapered surface?

A. My answer to that is no. If they were rounded, you would have to have an opening at the top, an aperture, [234] and the aperture would have to be very, very, very small or just you would not have it rounded. And if you get down to the point of the aperture which you refer to in that other patent there, that cartridge, there is only a real little aperture in through the top, and that is definitely not a fuse. There is a difference.

* * *

The Court: It might not be as desirable?

The Witness: That is right.

The Court: But it would perform the same function, would it not?

The Witness: That is correct, your Honor. That is desirable.

The Court: Just so it cannot be pushed in, just so the fuse cannot be pressured into the compartment of the projectile, is that it?

(Testimony of Herbert C. Clauser.)

The Witness: That is it exactly.

The Court: And your view is that this shape is more efficient and performs the function better than some other shape, is that it? [235]

The Witness: Yes, sir.

Q. (By Mr. Miketta): Does the patent tell you how large a diameter that should be at the small end of the nipple?

* * *

The Court: I will allow the question. This gentleman is an expert in the art. I will allow him to answer whether the patent teaches how much taper there should be of that fuse. Is that your question?

Mr. Miketta: Yes, your Honor, and what the diameter of the opening should be in the small end of the nipple or eyelet in comparison with its largest diameter. Does the patent teach that?

A. It don't teach that, but that has been arrived at, that is, during the process of trial and error that we have found out that.

* * *

A. By experiment we have found out which is an opening which is designed to allow enough spit to come through there to make a sure-fire ignition. That is by practice, by [236] experimentation that we have learned that, and consequently it has been put into use, and, at the same time, get sufficient constriction there to keep the powder from being blown through so as to cause a premature.

The Court: You mean you have learned it by experimentation and practicing the invention——

(Testimony of Herbert C. Clauser.)

The Witness: Yes, sir.

The Court: —since the patent was issued?

The Witness: No, that is before. That is in the early days. That is how those things are arrived at. That is the way we arrive at those things.

Q. (By Mr. Miketta): By “we” you refer to Triumph?

A. Well, I mean today, yes, sir, we have problems like that coming up. That is, those things do not appear——

Q. We are talking about this, Dr. Clauser. Let us stay on one subject, please. When you state that you arrived at this particular shape from your experimentation do you refer to Kilgore’s experience or to Triumph’s experience?

A. That is my experience.

Q. Your experience? A. Yes, sir.

Q. And you have been with Kilgore only since 1938, is that correct? A. Yes, sir. [237]

The Court: There is nothing in the patent that teaches you dimensions?

The Witness: There is nothing in the patent or in the art.

Q. (By Mr. Miketta): Do you agree with Mr. Hubbard’s statement which in general was that the weight and balance of a projectile case influenced the height to which it is projected?

A. The answer is obviously yes.

* * *

Q. And you know that from your own personal experience prior to 1938, is that correct?

(Testimony of Herbert C. Clauser.)

A. I know that ever since I worked with rockets.

The Court: If you didn't know it from experience, you would know it from the laws of physics?

The Witness: That's right.

Q. (By Mr. Miketta): And your general knowledge of science, which you know, would also teach you how large a parachute you needed to support a given weight for a given length of time, is that correct?

A. That can be calculated, yes, sir, reasonably close.

Q. And that knowledge was available to those in the art [238] back in 1929, is that correct?

A. I would say so, yes, sir, if they worked at it faithfully.

* * *

Q. The projectile case during the assembly or manufacture of these signal flares is forced or pressed into the open end of the cartridge, is that correct? A. That is correct.

Q. There has to be a certain amount of pressure or grip between the walls of that cartridge and the outer surface of the walls of the projectile case, is that correct? [239]

A. That is correct, sir.

Q. Now, if you were to have a very loose fit, then you would not eject your projectile shell or case to the required height, is that correct?

A. That loose fit is avoided by inserting that shell into a die so as to construct that taper bore

(Testimony of Herbert C. Clauser.)

so that you will not have a loose fit. That would be poor ammunition.

Q. So that the taper is a constriction which grasps and holds the projectile? A. Yes.

* * *

Q. (By Mr. Miketta): It is normal, then, that a sufficiently tight fit should exist between the cartridge case and the projectile case or shell, so as to stand water immersion and prevent water from getting in there, isn't that right?

A. Yes. [240]

Q. And you, as a man skilled in this art, would know as of 1929 that you couldn't weld, for example, that cartridge case to the projectile case, isn't that correct? A. That's correct.

Q. And would know, also, that you would just have to give it a sufficiently strong grip or contact to prevent water from getting in and at the same time to generate sufficient pressure in the cartridge chamber beneath the bottom of the projectile shell so as to eject it properly and to the desired height, isn't that right?

A. That is essential, yes, sir.

Q. Also, as a man skilled in the art as of 1929, you would know that you would not want any flame from the black powder used in propelling the projection case come flashing into the end of the projectile case or shell and prematurely igniting the black powder in that area, isn't that correct?

A. No, sir, that is bad stuff.

Q. So you would know that as of 1929, and you

(Testimony of Herbert C. Clauser.)

would therefore make a projectile shell or case which would be substantially gas-tight and prevent any such flame from traveling into the propelling charge, other than through the delay fuse, isn't that correct? A. That is correct. [241]

* * *

Q. (By Mr. Miketta): Irrespective of what material we are using, Dr. Clauser, if we had a projectile shell in the form of a metallic tube, and you attached a separate bottom on that tube, either by screwing it on or welding it on, as long as you made sure that you had a tight joint between that bottom and the walls of that projectile shell, wouldn't that answer the requirements and prevent flash?

A. It would as long as you get it to the point where you [242] get it absolutely tight.

* * *

Q. And of course it was known in 1929 that you could take and make a tubular member with an integral bottom on it from one piece of metal, was it not?

A. With an integral bottom on it, it was done, but it doesn't have the efficiency, it didn't work as foolproofedly as this item does. [243]

* * *

Q. Will you grant me this, Doctor, that a piece of metal in the form of a tubular member with an integral bottom was known in the military and pyrotechnic arts prior to 1929, generally?

(Testimony of Herbert C. Clauser.)

A. In military for projectiles, shells, yes, sir.

Q. Fine. And they also had a hole in the bottom, didn't they?

A. Yes, I think that is correct.

Q. And they put either firing caps or some other sort of a gimmick in that hole? A. Yes, sir.

Q. And those gimmicks had shoulders that rested against the bottom of the cartridge, is that correct? A. That's correct. [245]

* * *

Q. Dr. Clauser, let us assume for a moment that we have chopped a flare signal shell transversely immediately above the line joining the upper edge of the cartridge shell to the projectile shell, let's just eliminate that part altogether, and now all we are talking about is just the lower or bottom part of the projectile case or shell and the cartridge connected thereto, when that is exploded, when the charge in the cartridge is exploded, the absence of these side walls on the projectile case will not in any way vary or change the operation of your eyelet and delay fuse, will they?

* * *

A. The action of the fuse, do you mean, or the flare?

Q. The projectile case, we eliminate those walls of the projectile case, now the elimination of those walls will not change the function or operation of this eyelet, will it? [246] A. No.

Q. Now, those skilled in the art as of 1924 or

(Testimony of Herbert C. Clauser.)

'29 knew how to select a powder and how to determine how thick the walls of a cartridge should be to withstand the force of that powder, did they not?

A. Yes, sir. [247]

* * *

Recross-Examination

By Mr. Miketta:

Q. You referred to the patent in suit, Dr. Clauser. Fig. 1 of that patent does not show a complete signal flare, does it?

A. No, sir; Fig. 1 does not show a complete signal flare. That is correct.

Q. And the patent shows both muzzle loading and breech-loading flares? A. Yes, sir.

Q. Fig. 2 shows some sort of a star shell, is that correct? A. Yes, sir.

Q. Fig. 3 shows a hand shell, is that correct?

A. Yes, that is correct, but it can be used both ways. It can be used as a hand shell and it can be inserted, it can be inserted into a cartridge [252] base.

* * *

Mr. Miketta: I would like, if your Honor will permit me, to introduce this enlarged photostat just for the purposes of comparison, as the defendant's next in order, Exhibit K—mark it "K-1" [258] please, because I have another photostat for the same purpose.

The Court: Is there objection?

Mr. Schmieding: No objection, your Honor.

The Court: It will be received. [259]

* * *

Mr. Miketta: And of course we have Exhibit F-3, a patent which was not considered by the Patent Office here, and which has [263] Figure 1—Figure 1 being the enlarged view appearing on this tablet or folded sheet, which I would like to make of record as Defendants' Exhibit K-2.

* * *

The Court: Received in evidence. [264]

* * *

HERBERT C. CLAUSER

previously sworn.

Direct Examination

By Mr. Schmieding:

Q. Did Kilgore Manufacturing Company ever manufacture a flare such as depicted by Plaintiff's Exhibit F-18? That is Driggs patent No. 1,776,755.

A. Yes. [303]

* * *

The Court: Is this projectile case made of cardboard, fibre of some kind?

The Witness: The flare case is made out of cardboard, the projectile case is made out of aluminum, sir. [304]

* * *

(Testimony of Herbert C. Clauser.)

Cross-Examination

By Mr. Miketta:

Q. In Exhibit F-18, that is the Driggs and Faber patent, 1,776,755, I call your attention to page 2, lines 11 to 12; when they talk about a fuse, quote, "has burnt a suitable time to permit the projectile to be well clear of [306] the aircraft or firing platform," what did they mean by "firing platform"? Does that preclude the use of this shell from being fired from the ground, or from a firing platform as in your tests?

Mr. Hann: The witness stated that it might be fired from the ground, in his answer.

Mr. Miketta: He did so state?

Mr. Hann: Yes, he did so state.

* * *

Q. (By Mr. Miketta): In the patent in suit, Dr. Clauser, 1,947,834, on page 2, lines 18 and 19, it is stated,

"The principal use of the cartridge with its flare and parachute is as shown in Figure 4"—

Have you found that?

* * *

Now, if you look at Figure 4, that is a cartridge for a breech loading gun, is that correct?

A. Figure 4 as it is depicted here?

Q. Yes. [307]

* * *

(Testimony of Herbert C. Clauser.)

A. No, sir.

Q. That is for a muzzle loading?

A. That is for a muzzle loading gun, unless—I want to qualify that, Mr. Miketta.

Q. Pardon me.

A. The Army has a gun by which they load both this annular groove shell and the flange shell as breech load shells.

Q. As of 1930 and 1931 did they have such a gun?

A. No, sir, they didn't have a gun to fire both shells.

* * *

Q. And therefore, Figure 4 really relates to a muzzle loading shell which is of the type which you say was used from aircraft?

A. Yes, sir, that's definitely an aerial [308] shell.

* * *

The Court: What is the combination here, Mr. Schmieding?

* * *

The Court: That is covered by this patent?

Mr. Schmieding: It is the combination, for example, as expressed in claim 3, of a fuse, which is used in combination with a one-piece projectile case. [315]

* * *

The Court: So the novelty part of this invention is the use of a projectile case made of one piece?

Mr. Schmieding: That's right, your [317] Honor.

* * *

The Court: The same in 9, 10, and 11. There is a qualification inherent in the description of the combination. If a one-piece shell was known to the prior art, the tubular eyelet was known to the prior art, a shoulder on the eyelet resting on the outside of the base of the shell, what is the invention here?

Mr. Schmieding: The claim, in my opinion, should be interpreted narrowly in view of the drawings, and I believe they should be read that "in combination a projectile shell including." [322]

* * *

The Court: Well, had not that combination been used in the earlier Driggs and Faber patents, with the exception of the integral wall shell?

Mr. Schmieding: Yes, that is true. [324]

* * *

Mr. Schmieding: Your Honor, in this particular combination flares are old, parachutes are old, wooden blocks are old, but all of those when they were assembled did not function the way they should have functioned. It took——

The Court: That may be true, but if the combination was disclosed in the prior art there is no invention, the [326] precise combination, although your application of it may have produced a better result.

What I am getting at is this, what is there that is new in this combination that, for example,

Driggs and Faber hadn't previously disclosed in combination in their prior patent?

Mr. Schmieding: The onepiece shell that embodied these elements that took this prior art that didn't operate satisfactorily and made it a satisfactory apparatus.

The Court: So everything that is described in the patent in suit in combination has been previously claimed in combination, has it not, by these same inventors——

Mr. Schmieding: Except the one-piece shell.

The Court: ——in prior art, except that now they say we combine all these things with a one-piece shell?

Mr. Schmieding: That's right, your [327] Honor.

* * *

The Court: The combination has been the same, except that the shell has been in more than one piece?

Mr. Schmieding: That's right. [328]

* * *

The Court: What is the difference between claims 7, 8, 9, 10 and 11?

Mr. Schmieding: Claim 8 distinguishes from claim 7 only in the last three lines, which specifies, "and means on said base of the cartridge case for positioning said shell and case in a fire implement."

Claim 10 distinguishes from claim 9 only in lines 56 and 57, which include

“and means to prevent the collapse of said parachute.”

And claim 11 distinguishes from claim 10 only in the last three lines, which includes the words,

“and detachable closure means for said shell engaging said means for preventing the collapse of the parachute.” [329]

Claim 9 brings in the fact that the side walls are relatively thin material while the base is relatively heavy.

That seems to be somewhat different than the other claims in the case. [330]

* * *

The Court: Now, if you claim nothing but the projectile shell, you have a combination which does not produce any different or better result than the prior art produced, do you not?

Mr. Schmieding: Without the cartridge case?

The Court: Yes.

Mr. Schmieding: That is true, your [339] Honor.

* * *

The Court: As a matter of fact it is claimed where the prior art knew better flares of the same combination for these purposes, isn't it?

Mr. Schmieding: That is true. [341]

* * *

The Court: If there is any invention here at all, it seems to me, in view of the prior art, it has to be a very narrow combination, very narrow in scope. I am not saying it must be so narrow that

there is no room for any equivalent; I am not suggesting that it must be so narrow as to be limited to the precise device disclosed in the patent.

Mr. Schmieding: It is in a crowded art.

The Court: But as I understand the patent, it is not upon the idea of the invention, but upon the application of the idea, and unless you can apply the idea with the combination, unless it is a complete combination, where invention is claimed because of an improved result arising from a combination, unless it is a complete combination must it not be said that either it doesn't function, or (2) that it is void for want of invention because it does not operate to achieve the improved result? [347]

* * *

At the present time my view is that if there are any claims in this patent that can be sustained at all, it would have to lie in claims 7, 8, 9, 10, or 11.

Mr. Schmieding: I was going to call your Honor's attention to that, that that does define the combination with the cartridge case and one-piece shell. [348]

* * *

Friday, November 3, 1950—9:30 A.M.

* * *

Mr. Schmieding: We desire to limit the issue as to the claims in the present case.

We feel that claims 8 and 11 define the invention in its narrowest aspects. [350]

* * *

Mr. Schmieding: Claim 9 is exactly like claim

10 except that it does not include the means to prevent the collapse of the parachute.

The Court: It is not exactly alike, is it? The opening clause is "In combination, a cartridge case constituting a gun barrel."

Mr. Schmieding: That is right. I failed to notice that.

* * *

The Court: That is a muzzle-loading arrangement, Fig. 4.

Mr. Schmieding: That is a muzzle-loading arrangement. [352]

* * *

The Court: He probably needed to make it the same length. Now, laying aside patent infringement, he wants to copy the plaintiff's device.

Mr. Schmieding: That is right, and he did.

The Court: He may do that in size in order to meet the Coast Guard specifications, may he not, laying aside any question of patent infringement?

Mr. Schmieding: Oh, yes, yes.

The Court: He would have to make it out of aluminum, would he not, for it to be successful commercially?

Mr. Schmieding: I don't know of any substitute material that could be used. [359]

* * *

The Court: As I have said, gentlemen, during the course of oral argument, this case is not free from doubt on the issue of validity, which turns upon the issue of whether the new combination, what was done by the inventors, rises to the dig-

nity of invention. It seems clear to me that the inventors have devised something new and useful in this relatively crowded but apparently a slowly developing field. They have produced a new combination of old elements which together produce a better result than anything previously known to the art.

I find that the combination is not only new and useful, but it embodies invention. I am unable to distinguish this situation here from the Ray-O-Vac case in 321 U. S. Reports.

As to the claims 7, 8, 9, 10, and 11 of the United States Letter Patent 1,947,834 I find the combinations there described are new and useful and embody invention, and that those claims are valid and infringed by the accused device here, Plaintiff's Exhibit 2.

As to the other claims in issue, claims 1, 2, 3, 4, and 5, I find them invalid for want of invention, the combination there described not being a combination which would produce the new and improved result achieved by the combination described in claims 7, 8, 9, 10, and 11.

Specifically, I hold claims 1, 2, 3, 4, and 5 invalid for want of invention because not limited to a projectile shell in combination with a cartridge [401] case.

Accordingly, interlocutory findings of fact and conclusions of law are ordered in favor of the plaintiff and against the defendants, which will enjoin the defendants from further infringement of claims 7, 8, 9, 10 or 11 of the patent in suit, and

which will award plaintiff a judgment against the defendants for all damages which plaintiff may have sustained as a proximate result of the infringement of claims 7, 8, 9, 10, and 11 of the patent in suit at any time subsequent to the 1st of July, 1947, such damages to be assessed as provided by Section 4921 of the Revised Statutes as amended, 35 U. S. Code 70.

I further find that the plaintiff is entitled to an accounting from the defendants Signal Manufacturing Company, a corporation, and Charles Schneider, doing business as Signal Manufacturing Company, to aid the determination of the issue of plaintiff's damages resulting from the infringement by defendants of claims 7, 8, 9, 10, and 11 of the patent in suit, accordingly the cause will be referred to Howard V. Calverley as special master, pursuant to Rule 53 of the Federal Rules of Civil Procedure, with directions to hear the accounting as to profits derived by the defendants from the infringement of the claims 7, 8, 9, 10, and 11 of the patent in suit, and to hear all other relevant evidence on the issue of plaintiff's damages to be assessed pursuant to Section 4921 of the Revised Statutes as Amended, 35 U. S. [402] Code 70, and to report his findings of fact and conclusions of law with respect to assessment of damages arising from the infringement of the patent in suit.

I further find that the infringement was conscious, deliberate, and wilful, but decision on plaintiff's prayer for increased damages and for attorney's fees will be reserved until after determina-

tion of the issue as to plaintiff's damages. Plaintiff will recover costs of the defendants, to be taxed by the clerk, but the determination of the costs will await the determination of the issue of plaintiff's damages. [403]

* * *

Mr. Miketta: May the court please, in view of the fact that this case probably will be appealed, I should like to have your Honor's expression as to the validity of the remaining claims of this patent. [404]

* * *

The Court: Does claim 9 not claim a one-piece shell?

Mr. Schmieding: I do not see the words "one-piece shell" or "integral" in that.

The Court: Very well, the claim 9 will be held invalid for the same reasons as claims 1, 2, 3, 4, and 5 are held invalid, and the judgment heretofore indicated is modified accordingly.

Mr. Miketta: Now, may the court please, claims 10 and 11, and in original claims 12, 13, 14, and 15 that they charge us with infringement, claims 10, 11, 12, 13, 14 all include [406] an annular groove in the base of the cartridge case which we certainly do not use.

The Court: Yes, I know that, but is that anything more than a mere detail? [407]

* * *

The Court: Is there any contention they would function any differently?

Mr. Miketta: Yes, your Honor.

The Court: How?

Mr. Miketta: You cannot use that annular groove in the Coast Guard pistol, for instance.

The Court: But you might in some other pistol, might you not?

Mr. Miketta: That is correct. And then we are smack into the prior art again and the claims read on the prior art as far as that element is concerned. And if the stick is necessary in order to keep that parachute from collapsing, I want to call your Honor's attention to the fact that claims 7 and 8 do not include that stick, if that prevent the collapse of the parachute. [408]

* * *

The Court: What is the plaintiff's view of the importance of the means to prevent collapse of the parachute?

Mr. Schmieding: The entire apparatus would function whether that stick was in there or not. The stick adds to the function, that is true, but the projectile would go into the air to the same extent, the flare and the parachute would be ejected from the projectile shell after it reached the pre-determined height. [409]

The Court: Does plaintiff insist that this result can be achieved without the protection of the parachute?

Mr. Schmieding: Yes, your Honor.

The Court: Why is it used, then?

Mr. Schmieding: We obtain better results with the use of the stick. The stick insures that the

parachute will not collapse or be injured by the ejection.

The Court: I will hold claims 7 and 8 valid, but not infringed, because of the presence in the defendants' accused device of the means to prevent the collapse of the parachute and the absence of that feature as a part of the combination [410] claimed.

* * *

Mr. Schmieding: We will stand on the record that claims 6, 12 to 23, are not infringed.

* * *

The Court: What about this protection for the parachute? That is the one that disturbs me, the omission of that from paragraphs 7 and 8. I am not concerned about gas checks or closures at the end.

Mr. Schmieding: In that respect, your Honor, the defendant has not produced any evidence whatsoever that it will not work.

The Court: But the plaintiff has produced evidence that that is one of the salient features, hasn't it? [412]

Mr. Miketta: Precisely, your Honor. Dr. Clauser stated it would wad up, foul, and wouldn't be workable without that stick.

Mr. Schmieding: I don't believe Dr. Clauser testified that strongly.

The Court: Gentlemen, you have a transcript. Do you want to come back Tuesday, and we will take this up some more?

My recollection is that Dr. Clauser did testify that was a very important contribution, very important element. I may be in error. You have a transcript, and we don't have to resort to guesswork.

Mr. Schmieding: I agree with that, but the only point I am making is that it will work at times without that stick in position.

The Court: Then how can I hold the combinations embraced within claims 7 and 8 valid? Don't they fall in the same category as 1, 2, 3, 4, and 5, as lacking one of the essential elements to achieve this result?

Mr. Schmieding: They achieve a result, that's true——

The Court: And shouldn't I hold, then, 7 and 8 invalid for the same reasons—it is only a difference of degree—as the reasons for which I have held claims 1, 2, 3, 4, and 5 invalid?

Mr. Schmieding: I think you should. [413]

The Court: Well, that will be the holding. Vacating the order that claims 7 and 8 are valid, but not infringed, the court will hold that claims 7 and 8 are invalid as not embracing the complete combination necessary to achieve the result, and, hence, void for want of invention. [414]

* * *

The Court: Let's take up claim 6 first.

Mr. Schmieding: That, your Honor, reads specifically on Figure 3 of the patent.

The Court: Do you claim it is valid?

Mr. Schmieding: No.

The Court: You don't claim it is valid?

Mr. Schmieding: No, I don't claim it is valid.

The Court: The court will declare claim 6 invalid. Claim 12 omits——

Mr. Miketta: Omits the stick.

The Court: It is invalid. Go to the next one.

Mr. Miketta: Claim 13 is limited to the annular groove.

The Court: Claim 12 omits——

Mr. Miketta: The stick that holds the parachute up. [415]

The Court: All right. It is invalid for the same reasons as claims 7 and 8. I so declare it.

Mr. Miketta: Claim 13 is limited to the annular groove and includes a firing implement having means for detachably attaching the cartridge case therein. It is our contention, your Honor, that that claim is invalid because it includes the firing implement, or if that is a necessary element, then all of the other claims are invalid.

The Court: What do you say to that?

Mr. Schmieding: All what other claims? We will admit for simplicity that claims 12 to 23 are invalid, if that will clear up this matter.

The Court: The court will make the declaration to that effect, then. [416]

* * *

Monday, January 8, 1951, 2:00 P.M.

* * *

The Court: The Driggs patent 1,776,755, Exhibit F-18, of the prior art, issued on September 23, 1930, expired in 1947.

Mr. Schmieding: That is right, your Honor.

The Court: If anyone used that device would he infringe the patent in suit?

Mr. Schmieding: No, he would not.

* * *

The Court: Well, it would have a little different shape. Would the contents of the interior be arranged about the same?

Mr. Schmieding: The contents of the interior would be [2*] arranged substantially the same; that is true.

The Court: And the difference would be that one projectile case is in two parts and the other one is in one part.

Mr. Schmieding: That is right, your Honor.

The Court: And that would be the only difference?

Mr. Schmieding: No. I would not——

The Court: As far as difference between the two patents is concerned.

Mr. Schmieding: No. There is this difference also, if you will take notice, in the patent in suit we have a charge of powder—I will use the Exhibit 25 as an example.

The Court: I have a cross-section of it. Well, I have the drawings here.

Mr. Schmieding: We have an expelling charge interposed between the end of the projectile case and the interior cartridge case, that is, there is black powder inside of that chamber, whereas in

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

the expired patent there is no powder in the chamber A.

The Court: The chamber A?

Mr. Schmieding: In the expired patent, that is true.

The Court: Chamber A, is that in issue? Oh, yes. What expels the flare?

Mr. Schmieding: Well, I imagine merely a blank cartridge.

The Court: To expel the flare? [3]

Mr. Schmieding: That is right.

The Court: Of the projectile case.

Mr. Schmieding: That is correct.

The Court: How high would that expel it?

Mr. Schmieding: A very short distance; and that is one of the differences between this present invention and their earlier patent.

The Court: What has been done is this, isn't it: That the reason powder was not used in the expired patent was because the projectile case would not stand that pressure, would it?

Mr. Schmieding: That is right, your Honor, if you wanted to project it at the height that was desirable.

The Court: But under the expired patent could you project the projectile case to a high altitude?

Mr. Schmieding: No, you could not. I would like to——

The Court: But if you put powder in there, it would be expelled to a higher altitude, would it not, the projectile?

Mr. Schmieding: It would be expelled to a

higher altitude, but that is not the only problem you have. You have to hold a gun and you cannot put sufficient powder in there to expel that to such a height. The recoil would be such that one could not hold it. If you take notice, this gun is substantially large in itself. Now, you can only withstand a certain amount of recoil. If you built that projectile case [4] strong enough, if you built it out of two pieces so it would have such a weight that to raise it at the height desirable, you could not withstand the recoil.

This is placed, as you recall, in lifeboats and used merely as a distress signal. As Dr. Clauser testified, apparatus made in accordance with that expired patent was never used for projecting a projectile any substantial distance, and the patent so states.

The Court: I understand that. I recall that. But what is the claimed invention here is merely making a one-piece projectile case.

Mr. Schmieding: That is right, your Honor.

The Court: That is my problem. As a practical matter no one could build a flare, even using the precise device of the expired patent, if he put it in the single piece; he would be infringing the patent in suit.

Mr. Schmieding: That is right.

The Court: According to plaintiff's contentions here.

Mr. Schmieding: That is right, your Honor. It is that idea that they finally conceived after building the flares that were shot out of airplanes. This is an airplane type shell. There is no intention to

lift it up in the air. You are shooting it out of the airplane in this expired patent and it merely floats to the ground. You just merely use enough expelling charge to get it away from the airplane. You are not interested in expelling it very high into the [5] air.

The Court: Where is there invention in deciding that a one-piece shell will withstand more pressure than a two-piece device? As far as the powder is concerned, that is just merely a method of operation, isn't it?

Mr. Schmieding: Yes.

The Court: You would not claim any invention after putting powder in there in order to discharge the projectile at a greater height?

Mr. Schmieding: No. [6]

* * *

The Court: So what troubles me here, while we can talk about a combination and limiting a device to the precise combination taught in the patent, when we analyze it we are saying that making two pieces of one is an invention.

Mr. Schmieding: That is right. That is right, your Honor. [7]

* * *

The Court: How would you distinguish that from the Stewart Warner case the Alemite cases, the grease gun cases?

* * *

The Court: He claimed more than he invented, and that is the problem here, isn't it, whether this

inventor did not claim more than he invented? He claims nothing more than putting two pieces into one piece, and the combination existed in the expired patent, Exhibit F-18, did it not?

Mr. Schmieding: Yes.

The Court: And every part of it performs the same function it performs; that is, in both devices the only [8] difference is the expelling charge can be greater because the projectile case is one piece instead of two.

Mr. Schmieding: That is right.

* * *

[Endorsed]: Filed Jan. 22, 1951. [9]

DEFENDANTS' EXHIBIT G

C. A. Miketta,
210 West Seventh Street,
Los Angeles 14, California,
TR 0371,
Attorney for Defendants.

In the United States District Court, Southern Dis-
trict of California, Central Division

Civil Action No. 7693-WM

THE KILGORE MANUFACTURING COM-
PANY, a Corporation,

Plaintiff,

vs.

SIGNAL MANUFACTURING COMPANY, a
Corporation, and CHARLES SCHNEIDER,
d.b.a. SIGNAL MANUFACTURING COM-
PANY,

Defendants.

ADMISSIONS MADE BY PLAINTIFF IN
RESPONSE TO DEFENDANT'S RE-
QUESTS AND INTERROGATORIES

A. "1. That Louis L. Driggs, Jr., one of the
alleged inventors of patent No. 1,947,834 in suit
herein, testified under oath in the case of The Kil-
gore Mfg. Co., et al., v. Triumph Explosives, Inc.,
et al., in which case patent No. 1,947,834 was in
issue, as follows:

" "The Court: There is nothing new, is
there, in the arrangement of the contents of the

Defendants' Exhibit G—(Continued)

projectile? That is to say, this method of arranging the powder and connecting fuses and protecting certain parts by the felt washer and including a parachute and all that, is there anything new in that?

“ ‘The Witness: Not in the projectile itself, no, basically.’

* * *

“ ‘Q. Mr. Driggs, continuing for a moment the line of his Honor's examination, I understood you to say it is not your position that there is anything new in the arrangement of the contents of the projectile, is that correct?

“ ‘A. We make no such claim.

“ ‘Q. Is it your contention that there is anything new in the arrangement or in the combination of a projectile containing those particular contents, with a cartridge case containing a propelling charge for such a projectile, being adapted to be projected from the cartridge case when the propelling charge is exploded? A. No.

Note: Prefix “A” indicates matter is from First Request.

Prefix “B” indicates matter is from Second Request.

Prefix “C” indicates matter is from Third Request.

Prefix “D” indicates matter is from Interrogatories.

Defendants' Exhibit G—(Continued)

“ ‘Q. That combination is admittedly old, I take it?

“ ‘A. Well, it is exemplified by the old Very pistol ammunition which is a cartridge case projectile.’

(Record, pages 151 and 153.) ”

(Answer.) “Plaintiff admits that Louis L. Driggs, Jr., testified as quoted in paragraph 1 of Defendants' Requests for Admissions * * *

A. “2. That during the trial of this cause plaintiff will not contradict nor depart from the testimony quoted in the above request.”

(Answer.) “Plaintiff will not contradict nor depart from the testimony quoted in request No. 1 * * *.”

A. “9. That plaintiff will not claim novelty, during the trial of this case, in * * *

* * *

“(d) —in the arrangement or combination of a projectile containing a parachute candle or flare, protecting washers, expelling charge, and fuse with a cartridge case containing a propelling charge for such projectile and a primer or firing cap.”

(Answer.) “Plaintiff * * * admits the allegation in item (d).”

D. “6. State whether plaintiff will, during the trial of this cause, claim novelty in * * *

* * *

Defendants' Exhibit G—(Continued)

“(d) —in the arrangement and combination of a projectile containing a parachute candle or flare, protecting washers, expelling charge, and fuse with a cartridge case containing a propelling charge for such projectile and a primer or firing cap.”

(Answer.) “* * * Plaintiff will not, during the trial of this cause, claim novelty in the arrangement of the contents of the projectile as described in ‘(d)’ of Defendant’s interrogatory 6.”

B. “13. That prior to the earliest date of invention by Driggs and Faber of that which is described and claimed in claims 1 to 11 and 15 and 16 of the patent in suit, there was described in printed publications and known to others—

“(a)—parachute type flares including a projectile case, an annular, wooden disc partially surrounding the expulsion charge near one end of such case, a flare, a parachute, a wire or string connecting the parachute to the flare and a washer or gas check between the parachute and the flare;

“(b) —a pyrotechnic device including a projectile case, an ejection charge in the lower end of such case, a flare or candle and a layer of partitioning material between such flare or candle and other elements in the forward or upper end of the projectile case.”

(Answer.) “(a) Plaintiff admits that prior to the earliest date of invention by Driggs and Faber,

Defendants' Exhibit G—(Continued)

there was described in printed publications and known to others a parachute type flare including a projectile shell, an annular, wooden disc partially surrounding the expulsion charge near one end of the shell, a flare, a parachute, a wire or string connecting the parachute to the flare and a washer or gas check between the parachute and the flare.

“(b) Plaintiff admits that prior to the earliest date of invention by Driggs and Faber, there was described in printed publications and known to others a pyrotechnic device including a projectile shell, and ejection charge in the shell, a flare or candle and a layer of partitioning material between such flare or candle and other elements in the forward or upper end of the projectile shell.”

A. “13. That prior to the earliest date of invention for the subject matter of claims 1 to 11 and 15 and 16, upon which plaintiff will rely during the trial of this case, there was known to others in the United States the Webley-Scott pistol adapted to receive a flare cartridge by breach loading and adapted to expel such flare cartridge having a short cartridge case.”

(Answer.) “Plaintiff admits the allegations set forth in paragraph 13 of Defendants' Request.”

A. “3. That Louis L. Driggs, Jr., one of the alleged inventors of patent No. 1,947,834 in suit herein, testified under oath in the case of the Kilgore Manufacturing Company, et al., v. Triumph Explosives, Inc., et al., as follows:

“‘Q. By the way, Mr. Driggs, what type

Defendants' Exhibit G—(Continued)
of cartridge was used in the Webley-Scott pistol, if you know?

“ ‘A. A cartridge about $3\frac{1}{2}$, $3\frac{3}{4}$ inches long, and containing a pyrotechnic star.

“ ‘Q. Is that the only cartridge which was used in the Webley-Scott pistol, to your knowledge?

“ ‘A. That is one form. And then there was another form in which the cartridge case was quite short, that is, approximately $3\frac{3}{4}$ inches long, and in which a projectile case extended out of that cartridge case, and the projectile case had different types of pyrotechnics within it.’

(Record, pages 217-218).”

(Answer.) “Plaintiff admits that Louis L. Driggs, Jr., testified as quoted in paragraph 3 of Defendants' Request for Admissions in the case of the Kilgore Manufacturing Company, et al., v. Triumph Explosives, Inc., et al.”

A. “4. That during the trial of this cause plaintiff will not contradict nor depart from the testimony quoted in the above request No. 3.”

(Answer.) “Plaintiff during the trial of this cause will not contradict nor depart from the testimony quoted in paragraph 3 of Defendants' Request for Admissions * * *.”

A. “10. That during the first World War the A.E.F. extensively used a Very hand gun or projector and signals to be fired from such gun.”

Defendants' Exhibit G—(Continued)

(Answer.) "Plaintiff admits the subject matter of paragraph 10 of Defendants' Request."

A. "11. That the Very hand gun and projector was a short-barreled, single-barreled gun of the breech loading type adapted to receive a flare cartridge by insertion through the breech end of the barrel."

(Answer.) "Plaintiff admits the allegation in paragraph 11 of Defendants' Request for Admissions."

A. "12. That the flare cartridge used in the Very hand gun and projector resembled an ordinary shot gun cartridge in form but not size."

(Answer.) "Plaintiff admits the allegations set forth in paragraph 12 of Defendants' Request."

A. "13. That prior to the earliest date of invention for the subject matter of claims 1 to 11 and 15 and 16, upon which plaintiff will rely during the trial of this case, there was known to others in the United States the Webley-Scott pistol adapted to receive a flare cartridge by breech loading and adapted to expel such flare cartridge having a short cartridge case."

(Answer.) "Plaintiff admits the allegations set forth in paragraph 13 of Defendants' Request."

A. "14. That all signal flares including the signal flares employed in the Very and Webley-Scott pistols prior to the earliest date of invention of the subject matter of the patent in suit on which plain-

Defendants' Exhibit G—(Continued)

tiff will rely during the trial of this case included——

“(a) ——A cylindrical cartridge case;

“(b) ——a cylindrical projectile.”

(Answer.) “Plaintiff admits the allegations set forth in paragraph 14 of Defendants' Request.”

A. “8. That prior to the earliest date of invention by Driggs and Faber of that which is described and claimed in claims 1 to 11 and 15 and 16 of the patent in suit, there was known to others in the United States——

“(a) ——fixed or self-contained ammunition including a cartridge case and a projectile, the cartridge case acting as an auxiliary barrel from which the projectile was expelled in use;

“(b) ——fixed or self-contained signal flare ammunition including a cartridge case and a projectile to be fired from a pistol or firearm;

“(c) ——fixed or self-contained signal flare ammunition including a short cartridge case and a relatively long projectile;

“(d) ——fixed or self-contained signal flare ammunition including a relatively short cartridge case of circular cross-section and provided with an outwardly extended flange at the base thereof and a cylindrical, relatively long projectile extending from such cartridge case.”

(Answer.) “Plaintiff admits that there was known to others in United States the elements defined in (a), (b), (c) and (d) in Defendants' Request for Admissions * * *”

Defendants' Exhibit G—(Continued)

A. "6. That more than two years prior to September 19, 1931, there was publicly used and sold in the United States——

"(a) ——a tubular projectile having a transversely extending bottom or base, a port in such bottom or base, and a tubular eyelet inserted in such port, the eyelet having a flange resting on the outside of the base or bottom;

"(b) ——the tubular projectile having a transversely extending bottom or base, a port in such bottom or base, and a tubular eyelet inserted in such port, the eyelet having a flange resting on the outside of the base or bottom, the eyelet having a reduced inner end and a fuse powder in the eyelet."

(Answer.) "Plaintiff admits the allegations set forth in paragraph 6 of Defendants' Request for Admissions."

A. "7. That more than two years prior to September 19, 1931, there was known to others in the United States:

"(a) ——a tubular projectile having a transversely extending bottom or base, a port in such bottom or base, and a tubular eyelet inserted in such port, the eyelet having a flange resting on the outside of the base or bottom;

"(b) ——the tubular projectile having a transversely extending bottom or base, a port in such bottom or base, and a tubular eyelet inserted in such port, the eyelet having a flange resting on the outside of the base or bottom,

Defendants' Exhibit G—(Continued)

the eyelet having a reduced inner end and a fuse powder in the eyelet."

(Answer.) "Plaintiff admits the allegations set forth in paragraph 7 of Defendants' Request for Admissions."

B. "4. That prior to the earliest date of invention by Driggs and Faber of that which is described and claimed in claims 1 to 11 and 15 and 16 of the patent in suit, there was described in a printed publication and known to others in the United States——

"(a) ——a case or shell having a base and side walls of one piece of metal, the base having an aperture therein;"

(Answer.) "Plaintiff admits that prior to the earliest date of invention by Driggs and Faber, there was described in printed publications and known to others in United States

"(a) ——a cartridge case having a base and side walls of one piece of metal, the base having an aperture therein."

B. "5. That prior to the earliest date of invention by Driggs and Faber of that which is described and claimed in claims 1 to 11 and 15 and 16 of the patent in suit, there was described in printed publications and known to others in the United States——

"(a) ——a shell or case having substantially cylindrical side walls and a base integral therewith;

Defendants' Exhibit G—(Continued)

“(b) ——a shell or case having a base and substantially cylindrical side walls, of one piece of metal;

“(c) ——a shell or case having a relatively thick base and integral side walls, the side walls being thinner than the base, the shell being made of metal;

“(d) ——a shell or case having a base and substantially cylindrical side walls of one piece of metal, the base being provided with an aperture.”

(Answer.) “Plaintiff admits that prior to the earliest date of invention by Driggs and Faber, there was described in printed publications and known to others in United States——

“(a) ——a cartridge case having substantially cylindrical side walls and a base integral therewith,

* * *

“Plaintiff admits that prior to the earliest date of invention by Driggs and Faber, that there was described in printed publications and known to others in the United States——

“(b) ——a cartridge case having a base and substantially cylindrical side walls, of one piece of metal,

* * *

“Plaintiff admits that prior to the earliest date of invention by Driggs and Faber, that there was

Defendants' Exhibit G—(Continued)
described in printed publications and known to others in the United States——

“(c) ——a cartridge case having a relatively thick base and integral side walls, the side walls being thinner than the base, the cartridge case being made of metal,

* * *

“Plaintiff admits that prior to the earliest date of invention by Driggs and Faber, that there was described in printed publications and known to others in the United States——

“(d) ——a projectile case having a base and substantially cylindrical side walls, of one piece of metal, the base being provided with an aperture,”

* * *

A. “5. That Louis L. Driggs, Jr., and Henry B. Faber were not the first——

“(a) ——to provide an aluminum cartridge case;

“(b) ——to provide an extruded aluminum cartridge case.”

(Answer.) “Plaintiff admits the allegations set forth in paragraph 5 of Defendants' Request.”

C. “7. That the manufacture of cartridge cases having side walls and a base, from one piece of aluminum, was known to others in the United States prior to the earliest date of invention by Driggs and Faber of that which is described and claimed in claims 1 to 11 and 15 and 16 of the patent in suit.”

Defendants' Exhibit G—(Continued)

(Answer.) "Plaintiff * * * admits that the patent No. 1,114,228 shows a part of a cartridge case having cylindrical side walls and base formed of one piece of aluminum, * * *."

B. "10. That the manufacture of a case or shell by drawing metal to form a case or shell having side walls and a base integral therewith was known to others in the United States prior to the earliest date of invention by Driggs and Faber of that which is described and claimed in claims 1 to 11 and 15 and 16 of the patent in suit. (Attention is directed to U. S. patents No. 132,227 and No. 208,407.)

(Answer.) "Plaintiff admits that the manufacture of a cartridge case by drawing metal to form a case having side walls and a base integral therewith was known to others in United States prior to the earliest date of invention by Driggs and Faber, * * *."

B. "11. That patent No. 79,963 issued in 1868 relates to a parachute type signal."

(Answer.) "Plaintiff admits the allegations contained in paragraph 11 of Defendants' Second Request for Admissions."

C. "3. That prior to the earliest date of invention by Driggs and Faber of that which is described and claimed in claims 1 to 11 and 15 and 16 of the patent in suit, there was described in patent No. 116,094 issued June 20, 1871, the following:

"(a) —a hollow, cylindrical, one-piece metallic case or shell having a base and side walls of one piece of metal, the base having

Defendants' Exhibit G—(Continued)

an aperture therein, and an eyelet or small cup positioned in the aperture, the eyelet or cup having an outwardly extending flange or shoulder at one end, the flange or shoulder resting on the outside of the base."

(Answer.) "3. Plaintiff admits that prior to the earliest date of invention by Driggs and Faber, there was described in patent No. 116,094——

"(a) ——a hollow, cylindrical, one-piece metallic cartridge case having a base and side walls of one piece of metal, the base having an aperture therein, and a small cup positioned in the aperture, the cup having an outwardly extending flange or shoulder at one end, the flange or shoulder resting on the outside of the base,"

* * *

C. "4. That patent No. 116,094 shows a device including the following elements:

"(a) ——a cylindrical hollow shell;

"(b) ——a base for such shell, said base being integral with the side walls of the hollow shell;

"(c) ——an aperture in such base;

"(d) ——an eyelet or small cup extending through said aperture, said eyelet having a flange or shoulder at its lower end, said flange or shoulder being in contact with the lower surface of the base, said eyelet or cup having a reduced inner end."

Defendants' Exhibit G—(Continued)

(Answer.) "4. Plaintiff admits that patent No. 116,094 shows a device including the following elements:

"(a) —a cylindrical hollow cartridge case;

"(b) —a base for such case, said base being integral with the side walls of the hollow case;

"(c) —an aperture in such base;

"(d) —a small cup extending through said aperture, said cup having a flange or shoulder on its lower end, said flange or shoulder being in contact with the lower surface of the base,"

* * *

B. "8. That a pyrotechnic signal device having a relatively short case or cartridge shell and a longer projectile case is shown in——

"(a) —United States Patent No. 216,552 issued to Bogardus in 1879;

"(b) —United States Patent No. 987,590 issued to Murphy in 1911";

* * *

(Answer.) "(a) Plaintiff * * * admits that the patent to Bogardus No. 216,552 shows a projectile signal device having a relatively short cartridge case and a longer projectile shell;

"(b) Plaintiff * * * admits that the patent to Murphy No. 987,590 shows ammunition having a

Defendants' Exhibit G—(Continued)
relatively short cartridge case and a longer projectile shell”;

* * *

C. “5. That patent No. 1,114,228 issued October 20, 1914, shows a device including the following elements:

- “(a) —a cylindrical hollow metallic shell;
- “(b) —a base for such shell, said base being integral with the side walls of the hollow shell.”

(Answer.) “5. Plaintiff admits that patent No. 1,114,228 shows a device including the following elements:

- “(a) —a cylindrical, hollow, metallic case;
- “(b) —a base for such case, said base being integral with the side walls of the hollow shell,”

* * *

C. “8. That a pyrotechnic signal device having a relatively short case or cartridge shell and a longer projectile case or shell is shown in patent No. 1,602,601 issued October 12, 1926.”

(Answer.) “8. Plaintiff admits that patent No. 1,602,601 shows a signal device having a relatively short cartridge case and a longer projectile shell * * *.”

C. “9. That United States Letters Patent No. 1,602,601 relates to a parachute-type signal flare including a hollow, cylindrical projectile case and a cartridge case or shell having a base and side

Defendants' Exhibit G—(Continued)

walls of one piece of metal, the projectile case being appreciably longer than the cartridge case or shell."

(Answer.) "9. Plaintiff admits that patent No. 1,602,601 relates to a parachute-type signal flare including a hollow, cylindrical projectile shell and a cartridge case, said cartridge case having a base and side walls of one piece of metal, the projectile shell being appreciably longer than the cartridge case, * * *."

C. "10. That United States Letters Patent No. 1,602,601 shows a signal flare of the parachute type, said signal flare including as one of its components a hollow, cylindrical, metallic element having side walls and a base of one piece of metal, the base having an aperture therein."

(Answer.) "10. Plaintiff admits that patent No. 1,602,601 shows a signal flare of the parachute type, said signal flare including a cartridge case having hollow, cylindrical, metallic side walls and a base of one piece of metal, said base having an aperture therein, * * *."

A. "21. That patent No. 1,785,770 shows the combination of:

"(a) —a cylindrical hollow shell;

"(b) —a base for such shell;

"(c) —an aperture in such base;

"(d) —a tubular eyelet extending through said aperture;

"(e) —said eyelet having a flange or shoulder at its lower end;

Defendants' Exhibit G—(Continued)

“(f) —said flange or shoulder being in contact with the lower surface of the base.”

(Answer.) “Plaintiff admits the allegations set forth in paragraph 21 of Defendants' Request.”

A. “22. That patent No. 1,785,770 shows a device including each of the following elements:

“(a) —a cylindrical hollow shell;

“(b) —a base for such shell;

“(c) —an aperture in such base;

“(d) —a tubular eyelet extending through said aperture, said eyelet having a flange or shoulder at its lower end, said flange or shoulder being in contact with the lower surface of the base.”

(Answer.) “Plaintiff admits the allegations set forth in paragraph 22 of Defendants' Request.”

B. “19. That prior to October 16, 1946, plaintiff did not have the entire title to the patent in suit.”

(Answer.) “Plaintiff admits the allegations set forth in paragraph 19 of Defendants' Request.”

A. “20. That the Patent Office rejected the following claims as lacking invention and the applicants Driggs and Faber of the patent in suit assented to such rejection and cancelled the following claims:

“‘1. A new article of manufacture for use as a flare shell comprising an apertured base having a tubular eyelet therein and an integral drawn wall of thinner section than the base,

Defendants' Exhibit G—(Continued)

said base and wall constituting a structure having a continuous, smooth exterior surface without shoulders.

“ ‘2. A new article of manufacture for use as a flare shell comprising an apertured base with a smooth exterior without shoulders and an integral drawn wall of thinner section than the base, said shell being formed of a one-piece drawn aluminum body.

“ ‘21. In a flare, the combination of a shell, a flare, a gas check, a folded parachute arranged longitudinally of said shell above said gas check, a closure for said shell on the other side of said parachute, and a wooden column interposed within said parachute between said gas check and closure to prevent the collapse thereof.

“ ‘35. In combination, a one-piece drawn shell case with a delay fuse in the base thereof, an ejectable gas-producing means therein, and a cartridge case detachably mounted on one end of said shell case having means therein for propelling the shell and detaching it from the cartridge case.

“ ‘36. In combination, a one-piece drawn shell case with a delay fuse in the base thereof, an ejectable gas-producing means therein, a cartridge case detachably mounted on one end of said shell case having means therein for propelling the shell and detaching it from the car-

Defendants' Exhibit G—(Continued)

tridge case, and a primer in the base in said cartridge case for igniting said means.

“ ‘38. In combination, a one-piece drawn shell case having an expelling charge and delay fuse in the base thereof, a gas-producing member attached to a parachute contained therein and ejectable therefrom by said expelling means, and a detachable cartridge case mounted on one end of the shell case having a propelling charge and primer therefor mounted therein.’ ”

(Answer.) “Plaintiff admits that the Patent Office rejected the claims quoted in paragraph 20 of Defendants' Request for Admissions and admits that said claims were cancelled * * *.”

B. “21. That the flare signal shown in Fig. 1 of the patent in suit cannot be discharged from a hand gun of the type shown in Fig. 8 by the action of the trigger, hammer and associated firing pin 37.”

(Answer.) “Plaintiff admits the allegations set forth in paragraph 21 of Defendants' Request for Admissions, * * *.”

B. “22. That the length of the projectile case or shell of the flare signal described and claims in patent No. 1,947,834 is not stated in the specification and claims—

“(a) —in inches;

“(b) —in millimeters;

“(c) —in any unit of measurement.”

(Answer.) “Plaintiff admits the allegations set forth in paragraph 22 of Defendants' Request.”

Defendants' Exhibit G—(Continued)

B. "23. That the length of the cartridge case of the flare signal described and claimed in patent No. 1,947,834 is not stated in the specification and claims of the patent——

"(a) ——in inches;

"(b) ——in millimeters;

"(c) ——in any unit of measurement."

(Answer.) "Plaintiff admits the allegations set forth in paragraph 23 of Defendants' Request."

B. "24. That the thickness of the base of (1) the cartridge case and (2) the projectile case of the flare signal is not stated in the specification and claims of patent No. 1,947,834——

"(a) ——in inches;

"(b) ——in millimeters;

"(c) ——in any unit of measurement."

(Answer.) "Plaintiff admits the allegations set forth in paragraph 24 of Defendants' Request."

B. "25. That the thickness of the walls of the cartridge case or shell is not stated in the patent in suit in any unit of measurement."

(Answer.) "Plaintiff admits the allegations set forth in paragraph 25 of Defendants' Request."

B. "26. That the thickness of the walls of the projectile shell or case is not stated in the patent in suit in any unit of measurement."

(Answer.) "Plaintiff admits the allegations set forth in paragraph 26 of Defendants' Request."

B. "27. That the outer diameter, inner diameter, and thickness of the wooden spacer block or

Defendants' Exhibit G—(Continued)

ring identified by numeral 7 in the patent in suit are not stated in any unit of measurement."

(Answer.) "Plaintiff admits the allegations set forth in paragraph 27 of Defendants' Request."

B. "28. That the length and diameter of the case 9 containing the flare 10 referred to in the patent in suit are not stated in any unit of measurement."

(Answer.) "Plaintiff admits the allegations set forth in paragraph 28 of Defendants' Request."

B. "29. That the size of the parachute 20 is not stated in the patent in suit in any unit of measurement."

(Answer.) "Plaintiff admits the allegations set forth in paragraph 29 of Defendants' Request."

B. "30. That the stick or column identified by numeral 21 is a means to prevent collapse of the parachute."

(Answer.) "Plaintiff admits the allegations set forth in paragraph 30 of Defendants' Request."

B. "31. That the length and diameter of stick or column 21 referred to in the patent in suit are not stated in any unit of measurement."

(Answer.) "Plaintiff admits the allegations set forth in paragraph 31 of Defendants' Request."

B. "32. That the diameter and thickness of the washer 17 referred to in the patent in suit are not stated in any unit of measurement."

(Answer.) "Plaintiff admits the allegations set forth in paragraph 32 of Defendants' Request."

B. "33. That factors which affect the total

Defendants' Exhibit G—(Continued)

length of a projectile case include the following—

“(a) —character and quantity of powder or other expelling charge required to eject the contents of the projectile case;

“(b) —the character and composition of the flare;

“(c) —the length of time the flare is to burn;

“(d) —the size of the parachute used;

“(e) —the desired rate of descent of the flare;

“(f) —the number and thickness of the washers and gas checks employed;

“(g) —the height to which the projectile case is to be shot before ejection of its contents.”

(Answer.) “Plaintiff admits the allegations set forth in paragraph 33 of Defendants' Request * * *.”

D. “1. Shall the defendant rely, during the trial of this cause, upon the sample, Plaintiff's Exhibit 2, made a part of the Bill of Complaint, as exemplary of the signal flares allegedly manufactured and sold by defendant?”

(Answer.) “Answering Defendants' interrogatory 1, Defendant shall rely, during the trial of this cause, upon the sample, Plaintiff's Exhibit No. 2, made a part of the Bill of Complaint, * * *.”

D. “3. Does the flare signal, Plaintiff's Exhibit

Defendants' Exhibit G—(Continued)

2, filed with the complaint herein, include any one or more of the following:

“(a) ——a case having a threaded base end;

“(b) ——a one-piece cup having a thin side wall formed in annular threads;

“(c) ——a one-piece circular shell open at either end;

“(d) ——a shell having a restricted base with threads pressed therein.”

(Answer.) “The answer to Defendants' interrogatory 3 is ‘no’.”

B. “1. That plaintiff's Exhibit 2 upon which plaintiff will rely as exemplary of signal flares manufactured and sold by defendant does not contain or include a cartridge case or shell having a base with an annular groove.”

(Answer.) “Plaintiff admits that when the words ‘annular groove’ are interpreted in their narrowest sense, Plaintiff's Exhibit 2 upon which Plaintiff will rely as exemplary of signal flares manufactured and sold by Defendant, does not contain or include a cartridge case having a base with an annular groove, * * *.”

B. “2. That plaintiff's Exhibit 2 upon which plaintiff will rely as exemplary of signal flares manufactured and sold by defendant does not contain or include an aluminum case with a detachable metallic closure for the open end thereof.”

(Answer.) “Plaintiff admits that Plaintiff's Exhibit 2 does not contain or include a detachable

Defendants' Exhibit G—(Continued)

metallic closure for the open end of the aluminum case of said exhibit, * * *."

B. "16. That plaintiff's Exhibit 2 upon which plaintiff will rely as exemplary of signal flares manufactured and sold by defendant is clearly and legibly marked with the legend 'Mfg. by Signal Mfg. Co., L. A. Calif.' at two separate places."

(Answer.) "Plaintiff admits that Plaintiff's Exhibit 2 is marked circumferential at the upper end 'Mfg. by Signal Mfg. Co., L. A. Calif.' and circumferential at the lower end 'Signal Mfg. Co., L. A., Calif.' * * *."

A. "19. That it is common in the pyrotechnic art to apply the color to the exterior housing or cover of an article or to a part thereof, such color conforming to the color of the contents of such pyrotechnic article."

(Answer.) "Plaintiff admits the allegations of Defendants' paragraph 19 * * *."

B. "12. That patent No. 79,963 issued in 1868 teaches that the color of the light produced by a pyrotechnic device 'may be indicated by the paper wad or cap by which it is confined.' "

(Answer.) "Plaintiff admits the allegations set forth in paragraph 12 of Defendants' Second Request for Admissions."

A. "15. That the diameter of signal flare cartridges and projectiles used in signal flares is established by specifications issued by the United States Coast Guard."

(Answer.) "Plaintiff admits that the diameter

Defendants' Exhibit G—(Continued)

of the signal flare cartridges and projectiles used in signal flares is now controlled by specifications issued by the United States Coast Guard * * *."

A. "16. That a signal flare for use in a signal pistol must be of a diameter and cross-sectional form adapted to enter and reasonably fit the dimensions of the bore and chamber of such pistol."

(Answer.) "Plaintiff admits the allegations set forth in paragraph 16 of Defendants' Request."

A. "17. That the chamber and bore dimensions of signal pistols are established by specifications issued by the United States Coast Guard."

(Answer.) "Plaintiff admits that at the present time specifications are issued by the United States Coast Guard with respect to the chamber and bore dimensions of signal pistols * * *."

B. "15. That 'General Rules and Regulations for Vessel Inspection' issued by the United States Coast Guard in August, 1943, included the following requirements—

"(a) —that parachute signal cartridges contain a projectile which will give forth a brilliant red flare of not less than 20,000 candle power, capable of being projected to a height of not less than 150 feet and of not less than 30 seconds burning duration;

"(b) —the dimensions of the barrel and chamber of the pistol;

"(c) —the signal cartridges shall be capable of fitting into and firing from a pistol

Defendants' Exhibit G—(Continued)

bored and chambered in conformity with the dimensions given;

“(d) —that all pistols and cartridges be marked with the name and address of the manufacturer and the date of manufacture.”

(Answer.) “Plaintiff admits the allegations set forth in (a), (b), (c) and (d) of paragraph 15 of Defendants' Second Request for Admissions.”

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 114, inclusive, contain the original Bill of Complaint; Answer; Plaintiff's Answer to Defendants' Second Request for Admissions; Stipulation; Order Allowing Filing of Second Amended Answer and Counterclaim; Second Amended Answer and Counterclaim; Answer to Defendants' Counterclaim; Defendants' Objections to and Revisions of Findings of Fact and Conclusions of Law as proposed by Plaintiff; Petition for Rehearing; Plaintiff's Memorandum in Support of Its Proposed Findings of Fact and Conclusions of Law; Plaintiff's Proposed Findings of Fact and Conclusions of Law; Findings of Fact and Conclusions of Law; Interlocutory Judgment; Injunction; Notice of Appeal; Statement of Points on Appeal;

Designation of Record on Appeal; Stipulation and Order Extending Time to File Counter-Designation of Record; Order Extending Time to Docket Appeal; Designation of Additional Portions of Record on Appeal and Stipulation and Order Correcting Reporter's Transcript and a full, true and correct copy of minute order entered December 29, 1950, which, together with copy of Reporter's Transcript of Proceedings on December 13, 1948; October 31, November 1, 2 and 3, 1950, and January 8, 1951, and original Plaintiff's Exhibits 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 16, 21, 22, 22a, 23, 24, 25, 26, 27, 28 and 31, and original Defendants' Exhibits A, B, E, F-1 to F-32, G, H-A, H-B, K-1 and K-2, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$3.20, which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 4th day of April, A.D. 1951.

[Seal]

EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12892. United States Court of Appeals for the Ninth Circuit. Signal Manufacturing Company and Charles Schneider, Appellants, vs. The Kilgore Manufacturing Company, a Corporation, Appellee. Transcript of Record. Appeal From the United States District Court for the Southern District of California, Central Division.

Filed April 5, 1951.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12,892

SIGNAL MANUFACTURING COMPANY, a
Corporation, and CHARLES SCHNEIDER,
d.b.a. SIGNAL MANUFACTURING COM-
PANY,

Appellants,

vs.

THE KILGORE MANUFACTURING COM-
PANY, a Corporation,

Appellee.

NOTICE OF ADOPTION OF
STATEMENT OF POINTS

Appellants in the above-entitled cause hereby formally adopt as their statement of points on appeal under Rule 19(6) the concise statement of defendants-appellants' points on appeal pursuant to F.R.C.P. 75(d) starting on page 87 of the certified record on appeal on file herein.

Dated: April 10, 1951.

/s/ C. A. MIKETTA,

/s/ W. W. GLENNY,

Attorneys for Appellants.

[Endorsed]: Filed April 11, 1951.

No. 12892

United States
Court of Appeals
for the Ninth Circuit.

SIGNAL MANUFACTURING COMPANY and
CHARLES SCHNEIDER,

Appellants,

vs.

THE KILGORE MANUFACTURING COM-
PANY, a Corporation,

Appellee.

SUPPLEMENTAL
Transcript of Record

Appeal from the United States District Court,
Southern District of California,
Central Division.

No. 12892

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Court of Appeals
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SIGNAL MANUFACTURING COMPANY and
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SUPPLEMENTAL
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court, Southern
District of California, Central Division

Civil Action No. 7693-WM

THE KILGORE MANUFACTURING COM-
PANY, a Corporation,

Plaintiff,

vs.

SIGNAL MANUFACTURING COMPANY, a
Corporation,

Defendant.

PLAINTIFF'S ANSWER TO DEFENDANT'S
SECOND REQUEST FOR ADMISSIONS

Plaintiff makes answer to Defendant's Second
Request for Admissions, as follows:

* * *

V.

Plaintiff admits that prior to the earliest date of
invention by Driggs and Faber, there was described
in printed publications and known to others in
United States——

(a) a cartridge case having substantially
cylindrical side walls and a base integral there-
with,

but, denies that there was described in printed pub-
lications and known to others in the United States,
a projectile shell having substantially cylindrical
side walls and a base integral therewith;

Plaintiff admits that prior to the earliest date of

invention by Driggs and Faber, that there was described in printed publications and known to others in the United States——

(b) a cartridge case having a base and substantially cylindrical side walls, of one piece of metal,

but, denies that there was described in printed publications and known to others in United States, a projectile shell having a base and substantially cylindrical side walls, of one piece of metal;

Plaintiff admits that prior to the earliest date of invention by Driggs and Faber, that there was described in printed publications and known to others in the United States——

(c) a cartridge case having a relatively thick base and integral side walls, the side walls being thinner than the base, the cartridge case being made of metal,

but, denies that there was described in printed publications and known to others in the United States, a projectile shell having a relatively thick base and integral side walls, the side walls being thinner than the base, the projectile shell being made of metal;

Plaintiff admits that prior to the earliest date of invention by Driggs and Faber, that there was described in printed publications and known to others in the United States——

(d) a projectile case having a base and substantially cylindrical side walls, of one piece of metal, the base being provided with an aperture,

but, denies that there was described in printed publications and known to others in the United States, a projectile shell having a base and substantially cylindrical side walls of one piece of metal, the base being provided with an aperture.

* * *

Dated at Columbus, Ohio, this 6th day of October, 1948.

THE KILGORE MANUFACTURING COMPANY,

By /s/ H. B. WATKINS,
President.

Service of copy acknowledged.

[Endorsed]: Filed October 11, 1948.

[Title of District Court and Cause.]

PLAINTIFF'S MEMORANDUM IN SUPPORT
OF ITS PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW

It is respectfully submitted that Plaintiff's Proposed Findings of Fact and Conclusions of Law give the Appellate Court a clear understanding of the basis of Your Honor's decision and are supported by the evidence. It is further submitted that certain of the objections and proposals of defendants are contrary to the evidence, certain are unsupported by the evidence, and certain are merely argumentative subject matter.

We do not object to the first four sentences ending in line 9 of defendant's proposed finding A-1, but we do object to the remainder of this proposed finding since it is merely directed to argumentative subject matter as to defendants' consistent insistence that each and every claim must include each and every element and define the functions of all. This subject matter has been covered in our "Memorandum on Validity Claims 10 and 11," starting at the top of page 8, under the sub-heading "Claims 10 and 11 describe the Combination and All the Essential Elements with Specificity to Enable Anyone Versed in the Art to Practice That Invention."

As to defendants' proposed finding A-2, we submit that it is irrelevant to the issue since the claims in the Patent Office were drawn to a different combination than the application claims discussed in A-2. Furthermore, proposed A-2 does not set forth the full story. To be pertinent to the issue, the following should be added:

"However application claims 35, 36 and 38 were not limited to a parachute type of flare such as that defined in patented claims 11 and 12, which patented claims define a new combination of old elements which together produce a better result than anything previously known. Patent No. 1641549 (Exhibit F-14) was of record in the application of the patent in suit and claims 10 and 11 of said patent, which are limited to a parachute type of signal flare, were not considered as anticipated by Exhibit F-14."

With respect to defendants' proposed finding A-3,

we have no serious objection to the same except that it appears needless. Apparently this proposed finding is directed to claims 1, 2 and 3 of the patent in suit. Your Honor held those claims invalid because they did not define a complete combination including a cartridge case. If the Court finds that this proposed finding should be included, it is suggested that the word "cartridge" be inserted before the word—case—in line 22; that "or shell" be cancelled in said line and also the last word "shell" be cancelled and the word—case—be substituted, since we are dealing here with only cartridge cases and projectile shells.

Coming now to defendants' proposed finding A-4, we believe that, if the Court desires such detailed statement in the findings of fact, it should be supplemented with the whole truth by including the following sentence "The evidence also establishes that signal flares made in accordance with the above-described prior art were unsuccessful."

Defendants object to plaintiff's finding No. 2 on the ground that the stated finding is not one of fact but a conclusion of law and also states that it should be included among the conclusions. Where this is placed is optional with the respective courts. Some desire it in the findings and others in the conclusions. Nevertheless, it is a fact that the jurisdiction of the court depends upon the patent laws and also upon the fact of diversity of citizenship of the parties.

With respect to plaintiff's proposed finding No. 3,

we are willing to satisfy defendants by changing the same to read as follows:

“3. Plaintiff had full title to the patents in suit and the right to collect damages from and after said date in July, 1947, and plaintiff does not charge defendant with any acts of infringement prior to a date in July, 1947, on which date defendant initiated the manufacture of parachute-type signal flares, will not rely upon prior acts, if any, and will not claim damages for acts prior to said date in July, 1947.”

Defendants object to plaintiff's proposed finding No. 9 “on the ground that it does not correctly state what is in the patent in suit and is unsupported by the disclosures of the patent in suit.” We respectfully call Your Honor's attention to the fact that this finding is not directed to the specific language of the patent. This finding is directed to that to which the patent relates. The Court surely has the right to find, as it did, that flares made in accordance with the patent in suit, both plaintiff's and defendant's, have utility. Surely the Court can set out the facts of his findings of utility. Defendants continually attempt to evade the fact that a patent is directed to those skilled in the art. Those skilled in the pyrotechnic art know that a fuse having “compressed powder 5” (page 1, line 96 of the patent) is a “delay fuse.” Defendants knew it; they copied it. Those skilled in the art, would surely not attempt to expel the flare and parachute from the projectile shell after it is falling or while it is ascending. Obviously, the skilled pyrotechnic

engineer would time the delay fuse so that the flare and parachute are released at the highest point of the flight of the projectile shell.

In our proposed findings No. 9, we merely say that the patent in suit relates to a signal flare. The evidence is replete with utility of signal flares constructed in accordance with disclosure of the patent. When the patent is adjudged by one skilled in the art, it has all the utility expressed in the findings No. 9.

We have no serious objection to the inclusion of defendants' proposed finding B-1, to precede plaintiff's proposed finding No. 9, but we do strenuously object to substituting B-1 for No. 9, since such substitution would eliminate Your Honor's finding of utility in the patented structure.

Defendants' objection to plaintiff's finding No. 10 is merely an unwarranted argument. Both Dr. Clauser (R. 182, L. 17; R. 193, L. 13) and Hubbard (R. 52, L. 18; R. 64, L. 9) testified repeatedly as to the novelty and utility of signal flares made in accordance with the disclosure in the patent. The question arises, if there is nothing new or useful in the patented structure, why did defendants make a Chinese copy of it instead of following the teachings of the prior art. Plaintiff's counsel has always maintained that the use of the one-piece shell in combination with the other elements, set out in the claims, particularly claims 10 and 11, provided a new combination which produced a new result. This is evident through Dr. Clauser's and Mr. Hubbard's testimony. Defendants utterly failed to show that

the results, obtained by the patentees, could be attained by the structures of the prior art. A patent is presumed to be valid by reason of its grant by the Patent Office, and the defendant has a heavy burden of proof to show invalidity for lack of invention (Williams Mfg. Co. v. United Shoe Machine Corp., 121 F.(2d) 273, CCA 6, July 27, 1941) (affirmed 316 U. S. 364). We quoted in detail with respect to this decision in our "Memorandum of Points of Law and Authorities" and also referred Your Honor's attention to Ralph N. Brodie Co., et al., v. Hydraulic Press Manufacturing Company, 151 F.(2d) 91, CCA 9, August 29, 1945.

Defendants' proposed findings C-1, C-2 and C-3 are based on invalidity of claims 10 and 11 and are therefore contrary to the Court's finding.

Defendants' objection to plaintiff's proposed finding No. 11 is based on allegation that there was no "need" for the invention and no "commercial success" of the invention. We need to say only that defendants are manufacturing and selling what is shown and claimed in the patent. Furthermore, there is ample evidence in the testimony of Hubbard, Hatch and Dr. Clauser showing the need and the sale.

Defendants' further objections to plaintiff's proposed finding No. 11, on the ground of it being contrary to evidence, is set out in piece-meal objections to certain sentences in the finding. All the sentences of the finding are correlated. The finding is addressed to the claimed invention, the combination of elements which produce a better result. "The

subject matter of the patent in suit" is the subject matter claimed, particularly claims 10 and 11.

Defendants' objection to plaintiff's proposed finding No. 12, is merely an unwarranted argument. Proposed finding No. 12 does not state that the patentees were the first to use lightweight metal for projectile shells, as the defendant endeavors intentionally to squash the fact stated in the finding. Proposed finding No. 12 is directed to the utility of the invention as set out in the testimony of Hubbard (R. 52, L. 18; R. 64, L. 9) and Dr. Clauser (R. 182, L. 17; R. 184, L. 13).

Plaintiff's proposed finding No. 13 is not contrary to the evidence as alleged by defendant. Dr. Clauser testified that the material "was dumped into the Atlantic Ocean because of its failure to function" (R. 222, L. 17). Defendants cannot charge irrelevancy because at that time Dr. Clauser was testifying on cross-examination in defendants' attempt to show lack of utility of the patented invention over such flares as Defendants' Exhibit F-32.

It is regretted that defendants resort to such tactics as charging plaintiff of untruthfulness, such as appears in their opposition to plaintiff's proposed finding No. 14. Perhaps defendants overlooked Dr. Clauser's testimony (R. 181, L. 14) wherein he speaks of the advantages of the one-piece projectile shell over the two-piece type. (See quoted section in our brief "Memorandum on Validity of Claims 10 and 11" starting on page 4, line 28, and ending on page 6, line 20.) In (R. 182, L. 17, and R. 184, L. 13) Dr. Clauser asserted

the value of a one-piece shell having thin side walls and a base of thicker material, one that withstands the forces of the explosions of the propelling and expelling charges. Of course, the taper on the end of the fuse and several other elements are important, but defendants say all those elements are taught by the prior art. In this respect, attention is directed to applied pertinent decisions quoted in our "Memorandum on Validity of Claims 10 and 11" under the heading, page 8, "Claims 10 and 11 describe the combination of all the essential elements with specificity to enable anyone versed in the art to practice that invention."

Defendants object to plaintiff's proposed finding No. 15 on the ground it is not supported by the evidence. Plaintiff's finding does not state "that plaintiff's flares were 'the first successful distress signal'." Plaintiff's proposed finding No. 15 is based on Dr. Clauser's testimony on the unsuccessful signal flares such as Exhibit F-32 and the unrefuted testimony of Hubbard (R. 52, L. 18) wherein he stated:

"* * * The only thing that was a prescribed requirement for life boats, life rafts, was a hand signal, two-minute hand signal that ignited from a scratcher cap. You would hold it in your hand; it would burn two minutes at whatever level the holder was. By reason of the fact that the natural curve of the earth would block out that signal, a visibility at a distance of three to five miles, its efficiency from the standpoint of being a signaling device was naturally very limited. * * *"

and in (R. 64, L. 9) wherein he testified to Mr. Miketta's questions on cross-examination, as follows:

"Q. I understand you to say Mr. Hubbard, that before the Kilgore Manufacturing Company and Messrs. Driggs and Faber made the invention of the patent in suit No. 1947834, the only prior signal used in marine work was this, as you call it, a scratch type?

"A. A hand-type of signal.

"Q. A hand-type of signal which was lit in very much the same way that you'd light a Roman candle or a burning stick?

"A. No; it was a scratcher type. There was a cap on the end that by removing a strip of cloth you expose a scratcher on this cap that went over the end of the signal. By reversing that cap and scratching across the prime head of the signal, you could ignite it. You would hold it in the hand.

"Q. Then it would burn like a torch?

"A. That is right.

"Q. But it would not eject any signal to any height?

"A. That is correct. There were signals manufactured at that time, prior to that time, that could be projected, but not the parachute type of signal. In World War I there was what they called the Very Pistol; you shoot a star in the air.

"Q. You are familiar with the Very Pistol and the star shells?

“A. Star shells were not pistol operated.

“Q. It is your contention that there were no parachute type flares prior to the invention allegedly made by Driggs and Faber in the patent in suit?

“A. No; I don't say that, but they had never been offered commercially. There were parachute signals made prior to that time of a sort.

“Q. They were not in commercial use?

“A. That is correct. * * *

Defendants' objection to plaintiff's proposed finding No. 16 merely sets out unwarranted arguments. Defendant Schneider testified (R. 159, L. 24) that he knew of only two manufacturers of parachute signal flares, i. e. plaintiff and defendants' and defendants cannot evade the fact that their flares are not made in accordance with the teachings of the patent in suit.

Defendants' objection to plaintiff's proposed finding No. 17 merely sets out unwarranted arguments. They state that the proposed finding is misleading and contrary to the evidence. They do not point out wherein it is misleading or contrary to the evidence, because they cannot. We merely point out that Exhibit F-3 does not anticipate the invention defined in claims 10 and 11 of the patent in suit, and Exhibit F-21, like Exhibit F-3, also shows a one-piece cartridge case, and that Exhibit F-21 was considered by the Patent Office during the prosecution of the patent in suit.

Defendants' objection to plaintiff's proposed find-

ing 18 merely sets out unwarranted argument. Our first sentence in that finding is addressed to the parachute type signal flare as defined in claims 10 and 11 and not, as defendants would have Your Honor believe, specifically to a one-piece projectile shell. Defendants' Exhibit F-14 is not directed to a parachute type flare, as defined in claims 10 and 11. Moreover that reference was of record in the application of the patent in suit and claims 10 and 11 were considered as not anticipated by Exhibit 14.

Exhibit 18 specifically states, page 1, line 62, that the container B, previously referred to as being made "preferably of fiber or cardboard" (P. 1, L. 58) "has a reduced hollow stem b, which fits snugly in the cartridge case A and an enlarged portion b' connected to the stem b by the annular shoulder b²."

With respect to defendants' objection to plaintiff's proposed findings 19 and 20, Your Honor ruled that claims 10 and 11 were valid and infringed, only after consideration of the prior art and the restrictions specified in said claims. Findings Nos. 19 and 20 set out those facts. Defendants may not agree with Your Honor's rulings, but such rulings are consistently followed by the courts as pointed out in the decisions in our "Memorandum on Validity of Claims 10 and 11."

Plaintiff's proposed finding 21 is not contrary to the evidence. Defendants' objection goes to their unwarranted contention that each and every element and the function thereof must be specifically set out in each claim. The law is to the contrary and

the pertinent decisions are found in our "Memorandum on Validity of Claims 10 and 11," starting on page 8.

With respect to defendants' objection to plaintiff's proposed finding No. 22 on the ground that infringement is a conclusion of law, we submit that it is also a finding of fact. In this connection the Court's attention is directed to *Ralph H. Brodie Co., et al., v. Hydraulic Press Manufacturing Company* (supra). There the Court held in the third from the last paragraph that "The question (infringement) thus presented was one of fact."

Your Honor needed only to compare Exhibit 25, defendants' flare, with the patent in suit to find one is a Chinese copy of the other. The act of copying speaks for itself. There could be no clearer case of conscious, deliberate and wilful copying of a patented structure.

Still further with respect to defendants' objection to plaintiff's finding No. 22, defendants' right to enter the business was no greater than any other member of the public. The public, until the defendants entered the field, respected the rights of plaintiff in the patent.

Defendants' proposed substitute finding H-1 for plaintiff's finding No. 22, is merely argumentative matter directed to invalidating claims 10 and 11, on the ground that all elements are old; they totally ignore the better results obtained by defendants in their copying of the patented structure. Moreover defendants do not use a projectile shell as taught by Paulus (Exhibit F-14), nor a wooden annulus as

taught by an earlier patent of the same patentees (Exhibit F-16) nor are the contents of defendants' projectile shell arranged in the same manner as in Exhibit F-18; the latter exhibit does not show a wooden annulus; since it does not show a wooden annulus, it does not show expelling power confined in the annulus and a flare candle resting on the annulus. Furthermore, the patent to Paulus (Exhibit F-14) was considered by the Patent Office and claims 10 and 11 were allowed thereover. Too, Exhibit F-16 was not cited by defendants as anticipating the invention of the patent in suit, but cited merely for the purpose of showing the state of the art (see stipulation, Exhibit 21).

Your Honor may desire to supplement plaintiff's proposed finding 23, by adding to the end thereof, "Therefore, these claims do not define a complete combination," or Your Honor may prefer to adopt the first four sentences (lines 3-10) only, of defendants' proposed finding A-2. Defendants' proposed substitute finding is merely directed to the breadth of these claims and not to the validity decided by Your Honor.

Plaintiff has no serious objection to the substitution of defendants' proposed finding I-1 for plaintiff's 24 or the substitution of defendants' proposed findings J-1, J-2 and J-3 for plaintiff's finding 25, except for prolixity.

With respect to defendants' objection to plaintiff's proposed finding 26, it is regretted that defendants resort to such tactics as accusing plaintiff of endeavoring to mislead the Court. Proposed find-

ing No. 26 is a correct statement and does properly express the facts. Plaintiff merely introduced evidence as to the high percentage of failures of defendants' signals, also the fact that some of defendants' signals would not fit the pistol for which they were designed. At no time did plaintiff attempt to mislead the Court into believing that defendants were selling, to the trade signal flares that did not pass inspection by the Coast Guard, as alleged by defendants. All signals must be passed by the Coast Guard before offered for sale.

There is no foundation whatsoever for defendants' proposed finding L-1. Why defendants should resort to saying that plaintiff delayed proceedings is not understood and it is entirely without foundation. Counsel for plaintiff tried to cooperate with counsel for defendants in every respect to expedite the early trial of the case. On the other hand, defendants filed an Answer and two amended Answers, the latter of the two including a counter-claim. No attempt was made at the trial to support allegations contained in the counter-claim. Defendants also filed three lengthy requests for admissions, interrogatories, and refused to stipulate obvious facts which necessitated the tests and testimony in Columbus and Westerville, Ohio. The Court understood the purpose of these tests was to show that signals, shorter and longer than the standard length adopted by plaintiff, met the Coast Guard specifications, and it was deemed not necessary to take up the Court's time and clutter the record with these detailed tests. Defendants cited twenty-six patents

and six publications in their answer, requiring plaintiff to expend time and effort uselessly, since defendants relied only on a few of these thirty-one citations.

The Court is aware that plaintiff's counsel spoke with open candor throughout the trial, made no misleading representations, and, as officers of the Court and counsel for plaintiff, did every thing possible to cooperate with Your Honor to expedite the trial.

/s/ WARREN H. F.
SCHMIEDING,

/s/ WM. EDWARD HANN,
Attorneys for Plaintiff.

[Marginal Note]: The Court did not provide for memoranda of this type at the time of the ruling.

November 24, 1950.

/s/ C. A. MIKETTA

Receipt of copy acknowledged.

[Endorsed]: Filed November 24, 1950.

At a stated term, to wit: The September Term, A.D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Friday, the 29th day of December, in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable Wm. C. Mathes,
District Judge.

[Title of Cause.]

MINUTE ORDER

Good cause appearing therefor, it is ordered that the order of November 3, 1950, for findings and judgment and reference is vacated as to all its provisions and the cause is ordered placed on the calendar of January 5, 1951, 2:00 p.m., for further oral argument.

[Title of District Court and Cause.]

STIPULATION AND ORDER FOR CORRECTION OF RECORD

It is hereby stipulated by and between the parties that the reporter's transcript of proceedings of January 8, 1951, be amended as follows:

Page 4, line 24, cancel "a gun" and substitute—one—; line 26, cancel "recoil" (second occurrence) and substitute—projectile—.

Page 5, lines 1 and 2 cancel “as to be of” and substitute—it would have—.

Dated at Los Angeles, California, this 29th day of March, 1951.

/s/ WM. EDWARD HANN,

/s/ WARREN H. F.

SCHMIEDING,

Attorneys for

Plaintiff-Appellee.

/s/ C. A. MIKETTA,

Attorney for

Defendant-Appellants.

Order

It Is So Ordered, March 30, 1951.

/s/ WM. C. MATHES,

Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed March 30, 1951.

In the District Court of the United States in and
for the Southern District of California, Central
Division

No. 7693-WM-Civil

Honorable William C. Mathes, Judge Presiding.

THE KILGORE MANUFACTURING COM-
PANY, a Corporation,

Plaintiff,

vs.

SIGNAL MANUFACTURING COMPANY, a
Corporation,

Defendant.

REPORTER'S TRANSCRIPT OF
PRE-TRIAL PROCEEDINGS

Monday, December 13, 1948

Appearances:

For the Plaintiff:

HAROLD W. MATTINGLY, ESQ.,
WARREN H. F. SCHMEIDING, ESQ.

For the Defendant:

C. A. MIKETTA, ESQ.

* * *

Mr. Mattingly: Can we have a requirement,
though, by the Court that the defendant advise us
well in advance of trial which ones are to be relied
upon as anticipations? [9*]

* * *

The Court: Of course, you put them to a great deal more expense, you realize, unless you do segregate your prior art patents in some way so that the other side will know how much study to devote to them.

Mr. Miketta: They brought the action, your Honor, and it is their patent, and they should know what is the novel element that they believe to be the invention.

The Court: If you are not able to make any segregation in the prior art patents, you do not need to do so.

Mr. Miketta: May I ask you, Mr. Schmeiding—

The Court: Until you do make some segregation of them as between those that are relied upon to show anticipation and those merely to show the state of the art, I assume that the plaintiff will be forced to assume that all of them are relied upon to show anticipation.

Mr. Miketta: Isn't that putting the cart in front of the horse, your Honor? They bring the suit on their patent. Unless they let me know what is their invention and which element is the invention, how can I say: We will rely on this patent for anticipation and this only to show the state of the art? [10]

* * *

The Court: Does that help you any, Mr. Miketta? [11]

Mr. Miketta: I will be able to materially limit the elements. [12]

* * *

Mr. Mattingly: There is another exhibit we would like to offer at this time, your Honor; it has been shown to Mr. Miketta and was referred to in the depositions which were taken—a sample flare made by the plaintiff Kilgore Manufacturing Company.

The Court: It is established by the deposition.

Mr. Miketta: Objected to, your Honor, as not mentioned in the deposition but in an affidavit.

Mr. Mattingly: I beg your pardon. Mr. Miketta is correct.

The Court: There won't be any question. You will have a witness at the trial, I take it, to testify to that?

Mr. Mattingly: Yes, your Honor. Does Mr. Miketta object to this upon the ground that it is not a true representation of the plaintiff's flare?

Mr. Miketta: I do not know its origin, your Honor. I think that is a matter for them to prove.

The Court: You will have a witness here. We won't save any time by going into that now. If we stipulate to it, that question will be repeated upon the trial undoubtedly. [18]

* * *

The Court: How long will it take to try this, two days?

Mr. Mattingly: We have estimated that the plaintiff will probably take approximately three days to put its side of the case on. [19]

* * *

Mr. Schmeiding: Your Honor, I doubt whether

it is going to take three full days and I am quite sure it is going to take two full days, because we want to make some demonstration before the Court, if possible, and it may be necessary for your Honor to take a trip to the Coast Guard and see these demonstrations made. We cannot make them in open court.

* * *

Mr. Schmeiding: Well, we have one count in this suit upon unfair competition. We want to show your Honor that we can perform the same results with shells that look entirely different from ours.

The Court: You want to prove that the copying was of non-functional matter? [20]

Mr. Schmeiding: That is right.

The Court: Well, four days should finish it all, should it not? Can't you have some expert who can shoot off some of them and come in and tell the Court what happened?

Mr. Schmeiding: Yes; we can do that, but it would be very interesting for the Court.

The Court: Yes; just like going through a museum. Trying these patent cases, if I could just take the time to be thoroughly educated on all these fields, it would be very interesting. I would enjoy it. But we can't do anything more than take the essential things.

Mr. Schmeiding: Yes. My idea was that a demonstration would quickly give to the Court the entire picture of the invention.

* * *

The Court: Well, it might make some difference

on the unfair competition if the one party is copying not only the other's device but simulating it in such a manner as to make the public think it is the device of the other. That would be a material matter.

Mr. Miketta: Well, perhaps. In view of these so-called tests that have been referred to, I believe it would be [21] desirable in order to prevent surprise to have the plaintiff outline exactly what he intends to show and what other shells or flares he is going to demonstrate at such a demonstration.

The Court: I have not seen the necessity of the demonstration yet. That has been suggested.

* * *

The Court: What tests would you propose to make?

Mr. Schmeiding: We wanted to show that we can meet the Government specifications. The Government specifications are very broad, and we wanted to show that shells can be made that fully meet the Government specifications as to the height that the projectile is shot when the contents is ejected, the duration of the dropping of the parachute with the flare.

The Court: You would have to mechanically make the test, would you not?

Mr. Schmeiding: Yes. We are making several.

The Court: All right. You are going to have an expert, I take it?

Mr. Schmeiding: That is right.

The Court: Let him shoot them off and he can come in and tell the Court. He can bring some in

and show them to the Court, and tell us what the results of his tests were. [22] If you invite the defendant to the test, why, he may not have any evidence to oppose it. He may not wish to oppose the testimony.

[Endorsed]: Filed January 13, 1949. [23]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT
OF PROCEEDINGS

Los Angeles, California
Tuesday, October 31, 1950

Appearances:

For the Plaintiff:

WARREN H. F. SCHMIEDING, ESQ.,
WM. EDWARD HANN, ESQ.

For the Defendant:

CASIMIR A. MIKETTA, ESQ.

* * *

The Court: So the pleadings we have here now comprise the bill of complaint filed October 16, 1947, as now amended, the second amended answer and counter-claim filed December 21, 1949, as now amended, and the plaintiff's answer to the defendant's counter-claim filed March 22, 1950. Is that a correct and complete list of the pleadings?

Mr. Schmieding: That is correct, your Honor.

* * *

The Court: Do you wish to offer the pre-trial stipulation filed January 14, 1949, into evidence?

Mr. Schmieding: Yes, I would like to offer that into evidence as Plaintiff's Exhibit No. 21.

The Court: The pre-trial stipulation filed January 14, 1949, is received into evidence as Plaintiff's Exhibit 21. [6*]

* * *

Mr. Schmieding: There is filed in the case and marked for identification purposes one of defendant's flares, which is Exhibit 2, which I would like to show to the Court. And we also have a flare marked for identification purposes Plaintiff's Exhibit No. 7. [7] No. 2 is defendant's flare and No. 7 is plaintiff's flare.

The Court: Let me get this straight again.

* * *

Mr. Schmieding: We also took depositions of Mr. Schneider, a defendant in this case, and at that time marked for identification purposes Plaintiff's Exhibit 3, which is a cut-away of defendant's flare. We have a witness who will testify to the fact that this is a product of the defendant and that he had the flare cut as shown to show the interior of the same.

Mr. Miketta: May the Court please, there are admissions [8] in the record, in the first place, that there is no invention claimed in the arrangement of the contents of the projectile; in other words, that there is no invention in the arrangement of the parachute and the flare with the little candle and the stick and what not. And, therefore, that cut-

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

away model, frankly, is not important here except to show that there is an outside projectile case or shell and a lower cartridge cap.

The Court: Well, it might be important——

Mr. Miketta: From that standpoint——

The Court: ——to educate the court in the prior art, might it not?

Mr. Miketta: That is true. It might be of assistance to your Honor.

The Court: I would like to know what it is made of. Even if you are arguing to me it is only an embodiment of what was in the prior art, I would want to know what is inside of it, would I not?

Mr. Miketta: All right.

The Court: Will you stipulate that is a product of the defendant's, manufactured by the defendant, Exhibit 3?

Mr. Miketta: Our interior arrangements similar to those around the——

The Court: No, no, Mr. Miketta. I am just talking now and I asked you a question. Do you stipulate that Exhibit 3 is a product of the defendant, yes or no? [9]

Mr. Miketta: No. For the reason——

The Court: Very well, let us proceed, gentlemen. You do not need to say anything more about it. It would just take up a great deal of time. Proceed.

Mr. Schmieding: We also have a witness, your Honor, who had this chart made, which I would like to have marked for identification purposes Plaintiff's Exhibit 22.

The Court: 22 for identification.

Mr. Schmieding: Which shows the patent, a cross-section of the patent in suit, shows a cross-section of plaintiff's flare. The reason I am introducing these cross-sections of plaintiff's flare is to show that the patent has had utility and is used substantially as shown in the patent and the cross-section of the defendant's flare. We also have replicas of those for your Honor's convenience.

The Court: They are just illustrative?

Mr. Schmieding: Yes.

The Court: They are merely copies of Exhibit 22 for identification?

Mr. Schmieding: That is right.

The Court: Very well. Do you wish one marked?

Mr. Schmieding: Yes, sir.

The Court: The chart itself will be in evidence, I take it. It is marked here for identification. Is there any necessity of marking a small chart into evidence? [10]

Mr. Schmieding: I would think that we may want to put copies of these in our brief. Let us mark it 23.

The Court: 22-A.

Mr. Schmieding: 22-A.

The Clerk: Will this likewise be for identification?

The Court: 22-A for identification is a small replica of the chart Exhibit 22 for identification.

Mr. Schmieding: I believe by using this chart I can explain generally what the patent is directed to. It comprises what is known in the art as a cartridge case, which is a small case at the rear

end of the entire projectile. That cartridge case is provided with a shell which abuts the breech end of a pistol such as plaintiff's exhibit marked for identification Plaintiff's Exhibit 17. I will get one that has been fired.

That fits into this gun very similar to the shell of a shotgun fits into the breech of a gun. It is a short cartridge case and carries a relatively long, what is known in the art as a projectile case. That is shown in the green, the cartridge case in the orange.

Between the ends, the base of the projectile case and the interior of the cartridge case, there is a charge of powder and the end of the cartridge case carries a filing cap which, when the trigger of the gun is pulled, causes fire to be spit into the cartridge case, which causes the [11] projectile to be sent into the air.

The projectile case is made of very light metal. The purpose of that is to cut down the weight of the material; also, whatever goes up has to come down, and it is desirable that it be as light as possible so if in case it does fall and strike someone, they will not be injured. And it is also desirable to have the projectile case as thin metal as possible because we want to place in this relatively small container as much flare material as possible. We also must carry a relatively large parachute.

In this projectile case the base of it carries a little, what they term in the patent, eyelet, which is a small tube, and that contains a compressed powder which burns slowly. That compressed pow-

der, the right end of it, is ignited by the explosion that takes place in the cartridge case at the time that the projectile case is projected. That burns slowly, and while that is burning slowly the projectile is being sent into the air. When it reaches substantially its zenith of its flight, which is 150 feet or more, a second cartridge of black powder is exploded. That is indicated. That is No. 6 in the patent. We marked it "black powder" on the chart. When that explodes it will eject the flare and the parachute. The parachute and flare will move in one direction and the projectile case in the opposite direction and, of course, they both fall slowly to the earth. [12]

As Mr. Miketta stated, there generally is nothing new in providing a cartridge case and a parachute in a projectile case. But here we have specific arrangements of parts which are the cause of the success of this particular shell. [13]

* * *

The claims we rely upon in this case are specific and there are some slight differences in defendant's structure from the patent in suit. But the elements used by defendant are substantially the same and do the same work and accomplish the same result. And in this connection I wish to call your Honor's attention to the very recent decision of the Supreme Court of Graver Tank and Mfg. Co., Inc., v. Linde Air Products Co.

The Court: Yes, I am familiar with that [14] decision.

* * *

A. I do not have any note of the patent in suit being in evidence. Is it in evidence yet?

* * *

The Court: Yes, a copy is attached to the complaint as Exhibit 1. [19]

* * *

The Court: Is there any objection to receiving them in evidence in this form in which Mr. Miketta now proposes them?

Mr. Schmieding: I have not had an opportunity to see this, your Honor.

The Court: Of course, you are entitled to have the original interrogatories and the original answers offered. [22] But if there is no objection to the receipt of this compilation in a more convenient form and subject to check if you find anything different about it. [23]

* * *

DEPOSITION OF ARTHUR F. HUBBARD

The Court: He was referring, I take it, to this Plaintiff's Exhibit 5 for identification, a specimen of plaintiff's flare that has been shown.

Mr. Miketta: Flares under this patent.

The Court: He says over on page 6 of the deposition, "what was known when I was with the company as a No. 52 signal."

Overruled. [45]

* * *

"Q. (By Mr. Schmieding): Was it necessary to obtain approval on flares like Exhibit 5?"

* * *

(Deposition of Arthur F. Hubbard.)

“A. It was necessary prior to the time that they could be marketed commercially to the steamship operators. All equipment relevant—I think it is relevant—that is used on the steamships that come under the jurisdiction of the then Bureau of Marine Inspection and Navigation, had to be an approved type of equipment. [46]

Mr. Miketta: “What time are you referring to?

The Witness: “The early 30’s.

“Q. You say you made flares like Exhibit 5 back in 1934. Was the flare that you manufactured and sold in 1934 approved by any of the government departments?

Mr. Miketta: “Objected to on the ground it seems a fact not in evidence. The witness has not stated that the flare which he has in his hand at this time was identical or is identical to the flares which were manufactured and sold in 1934, or 1935.

Mr. Schmieding: “Q. You can answer the question.

“A. You mean the question you asked me?

“Q. That is right.”

* * *

The Court: The objection is overruled. You may read the answer.

Mr. Schmieding: “A. We manufactured these flares in the early part of the 30’s, essentially I would say practically identical with this, and we had approval from the government agencies on this flare.

(Deposition of Arthur F. Hubbard.)

“Q. Do you know approximately when you obtained that approval?

“A. I would say around 1934—’33, ’34. My dates, gentlemen, are a little bit vague. I am drawing from a period [47] over 15 years back.” [48]

* * *

Mr. Schmieding: “Q. Could you specifically state the difference between the flare that was approved by the government in 1934 and [49] Exhibit 5?

“A. I would say it is identical, with the possible exception as I say, that I cannot state categorically that there were two gas checks there, and this spacer here——

“Q. Will you refer to it more so it is clear in the record?

“A. This spacer which rests at the bottom of the projectile case, and it has a central cavity through which the delay fuse enters the projectile case. That spacer used to be made of a wooden block; this is a pressed paper spacer. Other than that, I see no difference whatsoever.

“Q. To your knowledge at the time that International entered the field in the sale of flares like Exhibit 5, were there flares on the market that performed the function of the flare shown in Exhibit 5? “A. Definitely there were not.” [50]

* * *

“A. (By Mr. Hubbard): Well, prior to the time that this aerial signal was developed by us——

(Deposition of Arthur F. Hubbard.)

“Q. ‘This aerial signal,’ Exhibit 5?

“A. This Exhibit 5. The only thing that was a prescribed requirement for life boats, life rafts, was a hand signal, 2-minute hand signal that ignited from a scratcher cap. You would hold it in your hand; it would burn two minutes at whatever level the holder was. By reason of the fact that the natural curve of the earth would block out that signal, a visibility at a distance of three to five miles, its efficiency from the standpoint of being a signaling [52] device was naturally very limited. After we had in collaboration with the Coast Guard developed different types of aerial signals and flares for their use, we thought that there might be a market for a signal of this type, Exhibit 5, commercially, for life boat and life raft use. Before we could do anything toward the commercial exploitation of the item, however, it was necessary to receive the approval of the governing body, which at that time was the Bureau of Marine Inspection and Navigation of the United States Department of Commerce, who controlled all items that went on to boats, life rafts, life boats, life preservers, anything that went on in the commercial steamship operations. Naturally, the commercial steamship operators were not going to use anything that was not approved by the governing body, the Bureau of Marine Inspection and Navigation. In the first place they were not allowed to.

“We had to prove to the Bureau of Marine Inspection and Navigation that our item possessed

(Deposition of Arthur F. Hubbard.)

merit far above what they had already approved as equipment for life boats and life rafts. We were able to do so by reason of tests they put on in New York Harbor on several different occasions, out of Baltimore, where we had the Supervising Board for demonstrations, and I think we went on Coast Guard cutters and we proved visibility from 26 to 30 miles away as compared with the previous limited visibility of from three to five [53] miles. I think that was about the figure. After which, and after much wrangling with them, they made a mandatory requirement that all boats and life rafts"—

I am reading the corrections that were made by the witness.

“——of ships under the American Registry should be equipped with an approved type of pistol and signal flare of this kind.

“Q. ‘This kind,’ is that Exhibit 5, you mean?

“A. Yes. There were certain functional characteristics prescribed at the time. I don’t say that no other signal made differently wouldn’t receive approval. In fact, there were others received approval subsequent to our pioneering the market on the thing.” [54]

* * *

“Q. (By Mr. Schmeiding): To whom would these flares eventually go after they were manufactured?

“A. Eventually go to the steamship operators.

(Deposition of Arthur F. Hubbard.)

“Q. Did you ever associate with any of the steamship operators?

“A. I used to make sales to them.”

* * *

“Q. Do you know a Mr. Baack?

“A. Yes. Billy Baack is Secretary of the Coston Supply Company of New York. I have known Baack for many years.” [55]

* * *

“Q. I believe you stated that many thousands of these flares like Exhibit 5 were manufactured and sold by the Kilgore Manufacturing Company and the International Flare Signal Company. Could you be more specific in that?

“A. How specific do you want me to be? I would say it is well in excess of a hundred thousand, if that is close enough. I know it is in excess of that.” [56]

* * *

“Q. With the groove?

“A. Yes, a different type of signal altogether, though. I mean the use of it was different.

“Q. It was a parachute type of signal flare?

“A. Yes, but it could not be shot in the type of pistol approved by this Bureau of Marine Inspection and Navigation. That annular type was shot from the muzzle of a pistol that was an airplane signal. This is a breech-loading proposition [60] here.”

* * *

(Deposition of Arthur F. Hubbard.)

Mr. Hann (for Mr. Miketta): "Q. Were those specifications in writing at that time?"

* * *

The Court: Aren't these questions and answers given in response to your questions on [63] cross-examination?

Mr. Miketta: That is correct, your Honor.

The Court: Motion denied.

* * *

"Q. A hand-type of signal which was lit in very much the same way that you'd light a Roman candle or a burning stick?

"A. No; it was a scratcher type. There was a cap on the end that by removing a strip of cloth you exposed a scratcher on this cap that went over the end of the signal. By reversing that cap and scratching across the prime head of the signal, you could ignite it. You would hold it in the hand.

"Q. Then it would burn like a torch?

"A. That is right." [64]

* * *

"Q. But it would not eject any signal to any height?

"A. That is correct. There were signals manufactured at that time, prior to that time, that could be projected, but not the parachute type of signal. In World War I there was what they called the Very Pistol; you shoot a star in the air.

"Q. You are familiar with the Very Pistol and the star shells?

(Deposition of Arthur F. Hubbard.)

“A. Star shells were not pistol operated.

“Q. It is your contention that there were no parachute type flares prior to the invention allegedly made by Driggs and Faber in the patent in suit?

“A. No, I don't say that; but they had never been offered commercially. There were parachute signals made prior to that time of a sort.

“Q. They were not in commercial use?

“A. That is correct.” [65]

* * *

“Q. I want to call your attention to one thing here. Is this characteristic of the Kilgore construction, wherein this little—I think you call this the timing nipple?

“A. Delay fuse.

“Q. It is in the form of a tube, or eyelet, provided with the flange, is that right?

“A. That is correct.

“Q. I notice in this Exhibit No. 5, that the flange of that eyelet holds a piece of felt?

“A. Yes.

“Q. Against that bottom? A. Gas check.

“Q. Is that characteristic of all the flares made by Kilgore and International Flare Signal? [73]

“A. To the best of my recollection, yes.” [74]

* * *

“Q. Did you actually go out and sell to these steamship operators in the course of your activities while you were still with Kilgore?

(Deposition of Arthur F. Hubbard.)

“A. We did at first.

“Q. I mean, did you personally?

“A. I did, definitely.” [75]

* * *

“Redirect Examination

“By Mr. Schmieding:

“Q. I will show you a piece of apparatus which I have marked for identification Plaintiff’s Exhibit No. 7, and ask you whether you can identify that?

“A. That is a No. 52 red parachute signal, from all external indications of it.”

* * *

“Recross-Examination

“By Mr. Miketta:

“Q. You said this was a No. 52 type flare. How many [76] numbers were there?

“A. Well, may I explain the origin of that No. 52? It may answer your question. Supplement 52 of the Regulations of the Bureau of Marine Inspection and Navigation was issued way back in the early days. Supplement 52 of the Regulations made a mandatory requirement for this type of signal. We called it No. 52 signal. That was the only reason for the No. 52.

“Q. Do you use other numbers to identify different types of flares? A. Oh, yes.

“Q. How many numbers were there all together? A. I can’t answer that question.

“Q. Twenty, thirty, a hundred?

(Deposition of Arthur F. Hubbard.)

“A. I would say around 30, 40, something like that.

“Mr. Miketta: That will be all.”

“Further Redirect Examination

“By Mr. Schmieding:

“Q. While you were employed by International Flare Signal Company and the Kilgore Manufacturing Company, who had charge of the sales records of those companies?

“A. You mean direct charge?

“Q. Yes. A. Some clerk in the office.

“Q. Who had supervisory charge?

“A. Well, one of my subordinates. Last analysis was [77] me, I guess.

“Q. While you were president of the International Flare Signal Company and vice-president of the International——

“A. Vice-president of Kilgore.

“Q. Yes; vice-president of Kilgore Manufacturing Company; did you have knowledge of the sales that were made by these companies?

“A. Very definitely.”

“Further Recross-Examination

“By Mr. Miketta:

“Q. Did you have anyone as a sales manager or district sales manager? A. I was it.

“Q. You had salesmen?

“A. No, we had no salesmen in the direct em-

(Deposition of Arthur F. Hubbard.)

ploy of the company except myself up to the time that I left the company. All the trade contacts were made by me.

“Q. That is when you were with the Kilgore Manufacturing Company? A. That is right.

“Q. Later on, when International Flare Signal got into the picture, what was the situation then?

“A. The same thing.

“Q. You didn’t use any salesmen at all?

“A. No salesmen. I said in the direct employ of [78] the company. We had men who operated on a commission basis, but with people like Coston or C. J. Hendry on the West Coast, such people as that, the contact was made directly by me or a representative in the case of Hendry on the West Coast and which I believe they still have.

“Q. In other words, they acted as your distributors in effect?

“A. Well, the fellow on the West Coast operated as a manufacturer’s agent. He had several lines and he handled our line as one of them. I am speaking of the chap on the West Coast.”

* * *

The Court: Very well. Do you offer Exhibit 5 for identification at this time?

Mr. Hann: Offer it in evidence.

Mr. Schmieding: I offer it into evidence at this time, [79] your Honor.

The Court: Is there objection?

Mr. Miketta: No.

The Court: Received into evidence. [80]

* * *

DEPOSITION OF GEORGE N. HATCH

“Q. What does the International Flare Signal Division of Kilgore Company make?

“A. They make all types of emergency landing flares for planes, all types of pyrotechnic signal equipment for planes. We make marine signalling equipment, distress equipment both of the parachute type and the hand type. We make smoke signals, distress signals approved by the Bureau of Merchant Marine and Inspection. We do a lot of subcontract work for different companies such as the Austin Company, Halliburton Oil Well; Westinghouse on research problems. We manufacture some types of munitions for the War Department.” [83]

* * *

“Q. (By Mr. Schmieding): To your personal knowledge, how long has a flare like Exhibit 5 been manufactured?

“A. To my personal knowledge since 1946, when the sale of these items came under my jurisdiction.

“Q. To your personal knowledge, has there been any change made in the manufacture of flares like Exhibit 5 since 1946?

“A. No; up until the present date?

“Q. Yes.

“A. Yes, there has been, because in the latter part, or the early part of last year, there was a new specification came out governing certain features of

(Deposition of George N. Hatch.)

this signal insofar as waterproofing and so on are concerned, so we did make some slight changes, only insofar as sealing, however.

“Q. What was that change?

“A. Well, that change includes some sealing composition between the projectile and the shell casing, a heavier [85] coat of lacquer on the top, that the cork sealing end and the signals are not placed in, each individual signal, in polyethylene bags.

“Q. To whom does Kilgore sell flares like Exhibit 5?

“A. Well, I have a list here of 19—that is, sales to various customers in 1946; 1947 and 1948 lists were not completed yet because it required going through a large number of invoices. I have the record here taken from the Tipp City sales record for 1944 and 1945.

“Q. Who has charge of those records?

“A. I do.

“Q. Will you read into the record the number of sales made during that period?

“A. The number of sales?

“Q. Or the names of the companies to whom you sold?

“A. Everything is in but Coston, because we had already turned Coston's record in.

“Mr. Miketta: May I direct some questions voir dire on this, Mr. Schmieding?

“Mr. Schmieding: Yes, go ahead.

(Deposition of George N. Hatch.)

“Voir Dire Examination

“By Mr. Miketta:

“Q. Did you personally prepare these lists?

“A. I personally prepared this list, not this one.

“Q. The 1944 and 1945 lists were personally prepared [86] by you? A. That's right.

“Q. And they were taken from the original records of the Kilgore Manufacturing Company?

“A. That's right.

“Q. I notice under 1944 there are some figures and letters such as 18D, 2D, 12D.

“A. That means 18 dozen, 2 dozen, 12 dozen, together with the 1945 record for that same company, a total of 77 dozen we had sold this company, which was Black Hardware of Galveston, in 1944 and 1945.

“Q. How were the original records marked from which you made this tabulation, Mr. Hatch? What was their form?

“A. Their form was a regular Tipp City form, a copy of the order to the shipping department to ship these items, what they called a factory shipping order.

“Q. Was that a separate shipping order for this 18 dozen and then another one for the 20 dozen, and then another one for the 2 dozen which appears under the heading 1945 and opposite Black Hardware?

“A. Each entry indicates a separate shipping order.

(Deposition of George N. Hatch.)

“Q. What was on those shipping orders? Whose was 24, 28 dozen?

“A. So many dozen, 18 dozen No. 52 red parachute flares. [87]

“Q. That order was dated?

“A. That order was dated.

“Q. What time in 1945 did you become associated with Kilgore Manufacturing Company? September 15, that is?”

That does not make sense to me now. Are there any corrections on that page?

“A. That is right, but understand that we did not take this operation to Westerville until January 1, 1946.

“Q. Had you been stationed at the Tipp City plant at all?

“A. Yes, not actually stationed, but because of the fact that the Tipp City plant was involved in a great deal of development work for which Westerville was the prime contractor, I had occasion to be there quite a bit at the time.

“Q. Are there published specifications or standard specifications to be followed by the manufacturing department of Kilgore Manufacturing Company and International Flare Signal Division in the manufacture of each one of these variously numbered flares?

“A. Oh, yes, because all of the flares that we manufacture, for instance our emergency landing flares for planes, come under the jurisdiction of CAA and are subject to CAA inspection. They have

(Deposition of George N. Hatch.)

to meet certain specifications. These units we manufacture for the Bureau of Marine Inspection [88] come under Coast Guard inspection. They have to meet certain specifications.

“Q. I mean when the plant is going to make, let us say, a thousand, five thousand, twenty thousand No. 52 flares, is there a certain fixed and definite specification followed that gives instructions as to the type of flare, composition to be employed, the type of expelling charge, how much, how many grains, and so forth?

“A. I will not say that they are government specifications.

“Q. I mean for your own plant?

“A. Oh, yes, that is right. There are specifications and blueprints.

“Q. Have you asked to examine all of those to make sure they haven't been changed since 1944?

“A. No, they have not.”

Then I made this objection, your Honor:

“I would object to the introduction of those lists on the ground that they are secondary evidence. They are not original entries; they are not original records. It is quite evident that there is no indication that those shipments—or no proof—that those shipments were made of any particular type of flare manufactured of any specified ingredient, although specifications apparently exist.”

The Court: This has not been offered here, has it, [89] or identified here?

Mr. Miketta: Well, they have not as yet been

(Deposition of George N. Hatch.)

identified, but we are coming to them subsequently, and the lists, I believe Mr. Schmieding does intend to offer them in evidence.

The Court: Very well, we will meet that when the time comes.

Mr. Miketta: Thank you, your Honor. I will continue.

“Q. Mr. Hatch, then your remarks with respect to the typewritten tabulation and headed 1946 would be the same as those remarks that you have made with respect to the 1944 and 1945, except that the typewritten list was prepared by one of your clerks?

“A. With one exception, that the 1946 list was taken from copies of invoices.

“Q. And not from shipping orders?

“A. Shipping orders, right.”

And then I voice the same objection to the other list, the 1946 list, that I had to the 1945-1944.

Mr. Hann:

“Direct Examination—(Continued)

“By Mr. Schmieding:

“Q. Mr. Hatch, will you read into the record, the names of the companies to which Kilgore has sold flares like Exhibit 5, and the address?

“A. Air Associates, Chicago; E. S. Burman, Chicago; Black Hardware, Galveston; Blake Company, New Haven, [90] Connecticut; Clark and Borman, Chicago; Durkee Company, New York;

(Deposition of George N. Hatch.)

Flood and Calvert, Galveston; Fox River Boat Works, De Pere, Wisconsin; Gulf Electric Supply Company, Pensacola; Gulf Coast Marine Supply Company, Mobile; Globe American Company, Kokomo; Gordon and Company, Manteo, North Carolina; J. Hendry Company, San Francisco; Kergard Boat Company, Marietta.

“Q. Marietta where, do you know?

“A. No. John Lekie Company, Toronto, Canada; Frank and Gordon, Cleveland, Ohio; U. S. Marine School, New London; Manteo Equipment Company, Manteo Boat Equipment Company, Manteo, Wisconsin; Neptune Supply Company, New Orleans; Newbold Company, Newport News; Oregon Marine Supply, Portland; Phillipps Hardware, Miami, Florida; Howard Roth, Deedee, Florida; Sunde and Devers, Seattle; Tidewater Supply, Norfolk; Tampa Marine Supply, Tampa; Van Karner Chemical Arms Supply, New York; Kelvin and Wilford White, Boston; Elisha Webb, Philadelphia; Walker Company, Baltimore, and the United States Government at Aberdeen, Maryland.

“Mr. Miketta: May the record show—and correct me if this is not true, Mr. Hatch, that some of the names that you read, some of the companies whose names you read, did not receive No. 52 flares in 1944, and some of the companies just listed by you did not receive flares in 1946?

“The Witness: Now that may be true; I would have to glance over that again. That is true, [91] yes.

(Deposition of George N. Hatch.)

“Q. All of those companies that you just read into the record received flares from the Kilgore Manufacturing Company either during 1944 or 1945? A. That’s right.

“Q. Could you tell me approximately how many—let me ask you this question—could you tell me approximately how many flares were sold in 1944?

“A. I can give you the approximate number in 1944 and 1945.

“Q. Like Exhibit 5?

“A. In those two years?

“Q. Yes, that will be all right.

“A. Approximately six thousand dozen.

“Q. Now are there any additional companies in your 1946 list?

“A. There are, and may I point out that the Coston Supply Company is not included in ’44 and ’45 because you already had that record here.

“Q. Will you look over that 1946 list and read in the record any other companies, any companies mentioned there, that are not included in the list that you just read into the record?

“A. American Munitions Company, Chicago Illinois; Ace Coin Machine Company, Dallas, Texas; Akron, Canton and Youngstown Railroad, Akron, Ohio; Frank T. Didge, Miami, [92] Florida; Blue Streak Enterprises, New Orelans; Crosby Yacht Building and Storage Company, Osterville, Massachusetts; Clark and Lund Boat Company, Oshkosh, Wisconsin; Favor Manufacturing Company,

(Deposition of George N. Hatch.)

Detroit, Michigan; Freeport Marine Supply Company, Freeport, New York; Foote Mineral Company, Philadelphia, Pennsylvania; Geophysical Service, Inc., Dallas, Texas; J. H. Hutton, Chautauqua, New York; Byron L. Harmon, South Bend, Indiana; Harbor Lights and Boat Club, Chicago, Illinois; Iroquois Club, Ashtabula, Ohio; Kimberly Clark Corporation, Neenah, Wisconsin; F. G. McFarlane, New Orleans; E. E. MacIntosh, Niagara Falls, New York; J. T. O'Connell, Inc., Newport, Rhode Island; Osgood Marine Ways, St. Petersburg, Florida; Servair, Inc., Detroit, Michigan; Shell Oil Company, Houston, Texas; Fred Schaub, Big Rapids, Michigan; United States Navy, Port Hueneme, California. That is all.

"Q. Were they purchasers of flares like Exhibit No. 5? A. They were.

"Q. Each and every one? A. Yes.

"Q. Have you tabulated the number of flares sold in 1946 like Exhibit 5?

"A. One thousand six hundred nineteen and one-half dozen." [93]

* * *

Mr. Schmieding: Your Honor the witness had charge of these sales. He actually called on these people and made the sales. There could be no better evidence than the man who actually did the selling.

He should know whether he sold them or whether he did not.

Mr. Hann: "Q. Do you know a Mr. W. R. Baack? A. I do.

(Deposition of George N. Hatch.)

“Q. In what way do you know him?

“A. Well, Mr. Baack is Secretary of the Coston Supply Company and is one of our very good customers. I contacted Mr. Baack quite frequently in my visits to New York on sales.

“Q. Does the Coston Supply Company purchase material from your company?

“A. Yes, they do.

“Q. What do they purchase?

“A. They purchase units similar to Exhibit 7. They also purchase hand signals, hand smoke signals, and hand flares.

“Q. Do you know, could you identify Mr. Baack's signature? [94] A. I think I could.

“Q. I show you paper marked for identification Plaintiff's Exhibit No. 6 and refer you to the signature in the lower right hand corner, and ask whether or not that is Mr. Baack's signature?

“A. This, to the best of my knowledge, is Mr. Baack's signature.”

The Court: There is a stipulation by Mr. Miketta on page 56, is there not, that the letter does bear the signature of Mr. Baack?

Mr. Miketta: Oh, I don't question that apparently is his own signature. They have not introduced it in evidence, your Honor, and I was not going to confuse everything at this time until they attempted to introduce it.

The Court: Do you wish to read the stipulation, or do you agree now there is a stipulation?

Mr. Miketta: I will read the stipulation.

(Deposition of George N. Hatch.)

“I will stipulate that is apparently the signature of a Mr. Baack, but I will not stipulate as to the truth of any statement, or to the veracity of any statements appearing in that, because it is not the proper method of proof of what you are introducing it for.”

I am not stipulating the admissibility of that document for any evidence of any statements appearing on its face.

The Court: Are there any qualifications to your stipulation [95] that the letter was signed by Mr. Baack, the secretary of the Coston Supply Company?

Mr. Miketta: No, your Honor. I so stipulate.

The Court: Very well, proceed.

Mr. Hann: “Q. I hand you this Exhibit 6, and ask you when you first saw the same?

“A. I can only answer in this way, that I first saw this letter on November 29, 1948, when it came to my desk.

“Q. Do you know whether or not this letter was written at the request of anybody from Kilgore Manufacturing Company? A. It was.

“Q. Whose request? A. At my request.

“Q. Could you state what you asked Mr. Baack to give you by letter?

“A. I asked Mr. Baack if he could give us from his purchase order records, the number of 52 parachute flare units that they had purchased from us since the signing of their contract with us as our eastern coast representative.”

(Deposition of George N. Hatch.)

Do you want to offer it in evidence?

Mr. Schmieding: I at this time desire to offer this letter into evidence as Plaintiff's Exhibit No. 6.

The Court: Where is it?

Mr. Miketta: That is objected to, your [96] Honor.

The Court: It has been marked 6 for identification here, has it?

Mr. Schmieding: It has been marked, yes, sir.

Mr. Miketta: Objected to on the grounds it is not the best evidence, and certainly not evidence as to any of the facts appearing thereon.

The Court: What is the purpose of the offer?

Mr. Schmieding: The only purpose of the offer is to show that the plaintiff has sold flares to the public, including that particular company.

The Court: The witness has testified he sold to that particular company, has he not? So what is the purpose of this letter? To show the amount of the sales?

Mr. Schmieding: Not necessarily, your Honor. That is the letter that was received at Mr. Hatch's request for information as to sales to that company. That is the letter Mr. Baack wrote back to him.

The Court: The objection is sustained. Proceed with the deposition.

Mr. Hann: "Mr. Schmieding: Mark this for identification Plaintiff's Exhibit No. 8.

"(Thereupon, paper writing was marked for the purpose of identification Plaintiff's Exhibit No. 8.)"

(Deposition of George N. Hatch.)

Mr. Schmieding: May I have that marked?

The Court: Do you have 8 for identification, Mr. Clerk? [97]

The Clerk: Yes, I have it.

The Court: What does it appear to be?

The Clerk: A document headed "United States Coast Guard General Rules and Regulations for Vessel Inspection Ocean and Coastwise, August, 1943."

Mr. Schmieding: I now offer that into evidence as Plaintiff's Exhibit No. 8. It is one of the defenses set up in the answer by the defendant.

The Court: Is there any objection?

Mr. Miketta: Not at all.

The Court: Received into evidence.

Mr. Miketta: I think that is identical to our Defendant's Exhibit D, is it not?

Mr. Schmieding: Yes.

The Court: Exhibit 8 for identification is received into evidence. Proceed with the deposition.

Mr. Hann: "Q. I show you photostatic copy of a pamphlet entitled 'General Rules and Regulations for Vessel Inspection, Ocean Coastwise,' August, 1943, of the United States Coast Guard, and which is cited in Defendants' Answer, and ask whether you have ever seen a paper like that before?

"A. Yes, I have.

"Q. To your personal knowledge do you know of any other issues of the United States Coast Guard dealing with the subject matter of that particular Exhibit 8? [98]

A. Yes, I do.

(Deposition of George N. Hatch.)

“Q. When was that issued?

“A. I believe in 1948.

“Q. I show you paper which is marked Plaintiff’s Exhibit No. 4, and ask whether you have ever seen anything like that? A. Yes, I have.

“Q. Is that the paper to which you referred when you said you saw another issue in 1948?

“A. That is right, this and a later draft.

“Q. Other than those three drafts, do you know of any other specifications that deal with that subject matter?

“A. Not issued by the government.

“Q. To what do those specifications refer, Exhibit 8 and Exhibit 4?

“A. They refer to the performance of this 52 red parachute signal.” [99]

* * *

The Court: Where is Exhibit 4 that is referred to?

* * *

The Court: Apparently a copy from the 1948 Regulations of the Coast Guard, isn’t it? I rather gather that from the subsequent testimony that has just been read.

* * *

Mr. Schmieding: It has been marked for identification.

The Court: Let it be marked here as Plaintiff’s Exhibit 4 for identification. It is the Rules and Regulations of the Coast Guard, 1948 edition of them.

(Deposition of George N. Hatch.)

Mr. Schmieding: That is right.

The Clerk: Called "Specifications for Signals, Distress, Pistol-Projected Parachute Red Flare (and Signal Pistol)."

The Court: Of the Coast Guard?

The Clerk: Yes, your Honor, dated 10 February, 1948.

The Court: Very well, you may proceed, Mr. Hann.

Mr. Schmieding: I offer that into evidence [100] as Plaintiff's Exhibit No. 4.

* * *

The Court: Exhibit 4 for identification is received into evidence.

* * *

Mr. Hann: "Q. Do you know from your own knowledge, independent of these records, of the relative quantity of 52 flares sold like Exhibit 5 while you were employed by the Kilgore Manufacturing Company?"

Mr. Miketta: I objected to that as ambiguous and indefinite.

The Court: Overruled. You asked the witness if he understood the question and the witness replied "yes."

Mr. Miketta: Let us skip all that. The answer was "That is correct."

Mr. Hann: "Q. Independently of those records, do you know whether they were sold in quantities?"

"A. Yes, I do.

(Deposition of George N. Hatch.)

“Mr. Schmieding: That is all.” [101]

* * *

“Q. (By Mr. Miketta): You wrote Mr. Baack a letter asking him for this information, did you not?

“A. No, I did not; I asked him for it over the telephone. [104]

“Q. I see. Is Mr. Baack an expert on pyrotechnics? A. No, he is not.

“Q. You have known him for some time?

“A. Since 1946.

“Q. Are you certain from personal examination of the Kilgore Company's records that each of the companies whose name you read from the 1946 list, as additive to the '45, '44 list, actually purchased No. 52 flares?

“A. I did not personally compile the 1946 list. My billing clerk compiled that list from copies of her invoices.

“Q. Did you ever have returns of any shells that are sold, or flares that are sold?

“A. No, we do not.

“Mr. Miketta: That is all.

“Redirect Examination

“By Mr. Schmieding:

“Q. At whose request did the billing clerk compile the 1946 record? A. At my request.

“Q. What did you request her to do?

“A. I requested that she go through her invoices

(Deposition of George N. Hatch.)

starting in 1946 when the material was manufactured and shipped from our plant, and list for me all customers who [105] had purchased the No. 52 red parachute signals and the quantities that they had purchased." [106]

* * *

CHARLES SCHNEIDER

* * *

Direct Examination

By Mr. Schmieding:

* * *

Q. I show you Plaintiff's Exhibit No. 2; is this one of your manufacture?

A. I will have to see the marking. (Witness looking at exhibit.) Yes.

* * *

Q. (By Mr. Schmieding): I show you a flare marked for identification Plaintiff's Exhibit 3 and ask whether you can [139] identify that flare?

A. Identify this what?

The Court: Is that one of the defendants' flares?

The Witness: I can't be sure. The case is marked here. I can identify the case.

The Court: Is the case manufactured by the defendant?

The Witness: No; it is manufactured by the Aluminum Company. That is to say, the case is.

Q. (By Mr. Schmieding): But you buy them from the Aluminum Company?

(Testimony of Charles Schneider.)

A. That is correct.

Q. That is the cartridge case and the projectile case?

A. That's right.

Q. Will you take a look at the candle in there? Does that look like one that you sell?

A. It looks like it. It looks like it.

Q. And the parachute?

A. I can't tell.

Q. Does that look like one you sell?

A. It could be. It looks like it, but I can't identify it.

Q. Can you place two gas checks between the parachute and the flare?

A. I don't know those details.

The Court: From all appearances, from your examination, [140] that appears to be one of the flares you sell?

The Witness: From the general appearance. I can't answer that last question as to the two checks.

The Court: As far as you can observe it with your naked eye from an examination of it, does it appear to be one of your flares?

The Witness: It could be, it appears to be, but I can't identify it positively.

The Court: Very well. Do you offer it in evidence?

Mr. Schmieding: I will reserve the offering, your Honor.

The Court: Very well.

Q. (By Mr. Schmieding): You started to manufacture flares like Exhibit No. 2 in July or August of 1947, is that correct?

(Testimony of Charles Schneider.)

A. I don't recall the exact date, but I believe that's right.

Mr. Miketta: I think that is covered, Mr. Schmieding, by the pre-trial stipulation, Section 6.

The Court: Are you referring to Exhibit 21?

Mr. Miketta: Yes, your Honor, pre-trial stipulation Exhibit 21.

The Court: Paragraph 6 on page 2, line 14:

"The plaintiff does not charge defendant with any acts of infringement prior to a [141] date in July, 1947, on which date defendant initiated the manufacture of parachute type signal flares," and so forth.

Q. (By Mr. Schmieding): I will show you Plaintiff's Exhibit No. 4, which is a specification by the U. S. Coast Guard, specification for signal distress pistol projected parachute red flares and signal pistol; have you ever seen that specification? I might add this was attached to your deposition that we took.

A. I believe this is a published specification, isn't it? I don't have to read through all of this. Unless you want me to identify it positively. I believe I have seen it. I have it in my own file, all these requirements here, if this is an official publication.

Q. Yes. When was that issued?

A. Am I required to read this? It is December 10, 1948.

Q. December 10—

A. I mean February 10th. I am sorry. February 10, 1948.

(Testimony of Charles Schneider.)

Q. What does this rubber stamp marking mean?

A. April 12, 1948, received by U. S. Coast Guard some place, I can't read it.

Mr. Miketta: Pardon me. Mr. Schneider, will you raise your voice a little so that I can hear you?

The Witness: All right. I am sorry. [142]

Q. (By Mr. Schmieding): But this specification was issued after you were in production?

A. That is correct, apparently. [143]

Mr. Schmieding: I ask that this flare be marked for identification purposes as Plaintiff's Exhibit No. 25. It is a longitudinal cross-section of a flare.

The Clerk: Plaintiff's Exhibit 25 for identification.

Mr. Schmieding: That is right.

Q. I show you Plaintiff's Exhibit marked for identification 25 and ask whether you can identify that flare?

A. I can't. This doesn't look familiar to me. Of course, I can't identify it. Let me see the markings.

The Court: Why don't you ask a leading question and suggest to him what it is?

A. I see our mark on the case here, and that would be the only way I could identify it. I can't identify this.

Q. (By Mr. Schmieding): In your manufacture you do put a flare at the bottom of the projectile case above that gas check?

A. I will tell you, I am not familiar with the details of the manufacture. I can't give you any

(Testimony of Charles Schneider.)

positive answers to those things. I don't know the details of the manufacture.

Q. You would not say it was not one of yours?

A. I can't say it was not, I can't say it was. I just can't answer the question.

Mr. Schmieding: I will reserve introducing this.

Mr. Miketta: If the Court please, we would be very glad to submit, if counsel so desires, a complete projectile shell, [144] empty, and the little base cap that is used in ours. But, for your information, Mr. Schneider does not know the details of manufacture. If you want a flare or a case and the cap, we will be very happy to produce it and identify it.

Mr. Schmieding: I thought perhaps that he would be able to identify his own flare so we would have less trouble. I will refrain from asking him questions along that line. [145]

* * *

The Witness: That is correct. I don't know of any other manufacturer. Do you? At least, I don't know of any other manufacturer at the present time. [160]

* * *

HERBERT C. CLAUSER

* * *

Direct Examination

By Mr. Schmieding:

Q. Your name is Herbert C. Clauser, and you reside in Westerville, Ohio?

(Testimony of Herbert C. Clauser.)

A. That's correct, sir.

Q. You are about 61 years old, Mr. Clauser?

A. Yes, sir, that's correct.

Q. By whom are you employed, Doctor?

A. Kilgore Manufacturing Company.

Q. And in what capacity?

A. Director of Research and Development.

Q. Could you be more general in explaining what that entails as to your duties with the company?

A. Yes, sir. Various projects that come to our company from the military, that is, either Air, Army or Navy, they are handed to my department for development, if possible, to see what development or what changes can be made so as to make a usable material for the purpose that it is intended. That [167] is not only true of the military forces, but it is equally true of private industry. We do a lot of development work on various projects that we take up and develop, if possible, for private industry.

Q. Is that mostly limited to pyrotechnics?

A. When it comes to my attention it is not limited to it, but it is allied to it, it bears on it.

Q. Doctor, will you give your education, the degree of education you have had? You went to college, I understand. Will you tell me what schools you went to?

A. Albright College, Cornell University, and the Johns-Hopkins University at Baltimore.

Q. At Albright College what did you major in?

(Testimony of Herbert C. Clauser.)

A. Chemistry, I took my B.S. degree in chemistry.

Q. At Cornell, what did you do?

A. Graduate work in chemistry.

Q. And at Johns-Hopkins you received your doctor's degree? A. Yes, sir, in chemistry.

Q. During this time did you do anything other than go to school?

A. Yes, sir, I was a poor boy and had to pay my own bills at college, therefore it became imperative for me to take a job as a teacher in chemistry from 1912 to 1915 to get money to go on with my graduate work 1915 to 1916 I [168] matriculated at Cornell University, did just graduate work there in chemistry. And in 1916 to 1919 my money ran out at that time, and I took another job as a research chemist, and we were then approaching—we were then at the precipice of World War I, and I entered the employ as a research chemist at the Aetna Explosives Company, which has now become the Hercules Explosives at Emporium, Pennsylvania. I worked there as a research chemist during the entire period of the war and for a short time thereafter.

Q. And what type of work was that, Doctor, what type of chemistry?

A. At that particular time it was entirely explosives, high explosives and black powder. I would say high order explosives and low order explosives. Black powder comes in the low order category; and

(Testimony of Herbert C. Clauser.)

nitroglycerin and TNT and fulminate of mercury, that comes in the category of the high explosives.

Q. After leaving Aetna where did you go?

A. I had money again then, and then I started to work to finish my doctorate degree. I went to Johns-Hopkins University. I was there from 1918 to 1921.

Q. From Johns-Hopkins where did you go?

A. I was then qualified to become research chemist at Picatinny Arsenal at Dover, New Jersey, which is the United States Army laboratory for research and development [169] work in explosives, pyrotechnics, et cetera. I went there as a research chemist. In connection with that, I officiated, had charge of the analytical chemistry laboratory. At the end of the war I was appointed as chemist in charge of the Army of Occupation at Coblenz, Germany, under Col. Maxwell, but that appointment was rescinded because of the fact that I was a married man. They preferred a single man.

Q. From the Picatinny Arsenal where did you go?

A. In 1924 I became employed as chief chemist of the Triumph Explosives Company at Elkton, Maryland, and I officiated there as the director in charge of the pyrotechnic division during my stay there, which was from 1924 to 1938.

Q. Did Triumph ever make any pyrotechnic apparatus?

A. Lots of it, from a million to two million dollars worth a year. It was exclusively pyrotechnic.

(Testimony of Herbert C. Clauser.)

Q. For whom did they make it?

A. They made it for the United States Military, Army, Navy and Air Forces.

Q. Any commercial?

A. Yes, sir, and commercial.

Q. During your occupation with these companies did any of them make a flare that was comparable with Kilgore's 52, or Exhibit No. 7?

Mr. Miketta: That is objected to, your Honor, as obviously calling for a conclusion. Let's get it a little [170] more specific. Did any of them make a parachute flare?

The Court: Sustained. I suggest that you rephrase it.

Q. (By Mr. Schmieding): Did any of those companies manufacture a flare that met the Coast Guard specifications?

A. Yes, sir, we manufactured those at Triumph Explosives, Inc., developed it. It met the function, but the construction was different.

Q. Was it a parachute flare, Doctor?

A. Yes, sir, it was.

Q. How long have you been associated with Kilgore, the plaintiff herein?

A. From 1938 to the present day.

Q. What was your previous employment, the next previous employment?

* * *

A. Triumph Explosives.

Q. Did the government employ consultants in pyrotechnics?

(Testimony of Herbert C. Clauser.)

A. Yes, sir, of different types.

Q. Have you ever been called upon?

A. I have been called—it is a common thing for me to be called in, that is, as a consultant, on the various problems as they concern pyrotechnics, by the Army and the Navy and Air Forces, as well. The fact of the matter is that [171] I should be at Wright's Field this week, that is, to take up a project where they are discussing a project concerning the making of a flare that is sadly needed in Korea.

Q. I show you a flare marked for identification as Plaintiff's Exhibit No. 7, and ask whether you can identify it.

A. According to the markings that is our 52 red parachute signal.

Q. By "our" you mean the plaintiff in this case?

A. Yes, the plaintiff, Kilgore.

* * *

Q. (By Mr. Schmieding): I show you a flare marked for identification Plaintiff's Exhibit No. 3 and ask whether you can identify that?

A. That is marked by the Signal Manufacturing Company of California, and from the outside appearances, as far as my knowledge goes, compares with it. Rather, it is identical [172] in appearance to two lots of signals that I had purchased by our purchasing department, two dozens at different times.

The Court: From whom?

The Witness: From ship's Chandler. The speci-

(Testimony of Herbert C. Clauser.)

fic name of the chandler I am not in position to state at this time, because that is handled by the purchasing department. The time at which it was purchased it was not realized, at least the first dozen, that it would be in litigation. [173]

* * *

The Court: It is a longitudinal cross-section of plaintiff's flares, will you so stipulate?

Mr. Miketta: Would the witness so testify?

Q. (By Mr. Schmieding): Would you so testify, that this is a longitudinal cross-sectional view of plaintiff's flare?

Mr. Miketta: In commercial production?

The Witness: May I ask a question at this stage?

The Court: Yes.

Mr. Schmieding: Go ahead.

The Witness: Was this section at our plant? Was the cross-section made at our plant?

Mr. Schmieding: You gave it to me, Doctor.

The Witness: That is all that I wish to know. It is a cross-section that I asked to be made of this signal. That is, [174] by the mechanical division of my development department.

* * *

Q. (By Mr. Schmieding): Dr. Clauser, did you have any drawings made of these longitudinal cross-sectional views of plaintiff's and defendant's flares?

A. Yes, sir, I did.

Q. Could you point to it?

A. On the board there.

(Testimony of Herbert C. Clauser.)

Mr. Schmieding: The witness points to Plaintiff's Exhibit 22.

The Court: For identification.

Mr. Schmieding: For identification. And I offer it in evidence as Plaintiff's Exhibit 22.

Mr. Miketta: May the Court please, we have the flares themselves now, and I think that could be used by your Honor for purposes of illustrating the witness' testimony, something [175] of that sort, but why burden the record with it in evidence?

The Court: I assume it is being offered to illustrate his testimony, but the foundation hasn't been laid yet, if you wish to insist on it.

Dr. Clauser, the top drawing on Exhibit 22, for identification, does that represent a drawing of a device pictured in the patent in suit?

The Witness: When I saw the placard with the drawings on it, the one in suit was at the top, so if that is that same placard, that is it.

The Court: The next one shows the arrangement of the component parts of the Kilgore flare?

The Witness: That was the order, yes, sir, that was on the placard that I had arranged.

The Court: Such as Exhibit 28? In other words, the middle chart there of Exhibit 22 would be, in effect, a diagram of what appears in Exhibit 28?

The Witness: Yes, sir, your Honor.

The Court: And the bottom drawing on Exhibit 22, for identification, would depict what is seen in a longitudinal cross-section of defendants' flare, Exhibit 25?

(Testimony of Herbert C. Clauser.)

The Witness: If the order is such as I had it made, if that is the placard, that is correct.

The Court: The top drawing you will notice is labeled "Patent," the second one is "Kilgore" and the bottom one [176] "Signal."

The Witness: That is an indication that that is the placard that was made under my direction and supervision.

The Court: Is there any objection to the offer?

Mr. Miketta: No, your Honor.

The Court: Very well. Exhibit 22 for identification, is received in evidence.

Q. (By Mr. Schmieding): They are a true representation?

A. They are, sir, because they were taken from cross-sections of the flares themselves.

The Court: And Exhibit 22-A, for identification, may be received if you desire to offer it, that being the small replica of Exhibit 22.

Mr. Schmieding: Yes, I offer that in evidence.

The Court: Exhibit 22-A, for identification, is received in evidence.

Q. (By Mr. Schmieding): Dr. Clauser, have you studied patent No. 1,947,834, the patent in suit?

A. Yes, sir, I have.

Q. I hand you a copy of Exhibit 22-A. Will you kindly point out and give the number of the cartridge case as depicted in the drawings of the patent?

The Court: Aren't all the various parts labeled and numbered on Exhibit No. 22 and 22-A? I as-

(Testimony of Herbert C. Clauser.)

sume those are the corresponding numbers which appear in the drawings of the [177] patent.

Mr. Schmieding: That's right, your Honor. I want to bring out that in the trade this 27 is known as the cartridge case, and No. 1 is known as a projectile case or shell.

The Court: I think you might ask leading questions on those matters, unless there is some issue about it.

Mr. Schmieding: All right.

Q. (By Mr. Schmieding): The trade terms the rear part, the small casing, the cartridge case, is that right, Doctor? A. That is correct, sir.

Q. And the elongated case the projectile shell?

A. That is the projectile case. The shell which is projected?

Q. Yes. A. That is the projectile. [178]

The Court: The projectile shoulder or case is No. 2 on the patent drawing, is it not?

The Witness: That is right, your Honor.

The Court: And the cartridge case?

* * *

The Court: Twenty-six, is it not?

The Witness: It looks like 27.

The Court: Twenty-seven is the cartridge case base, is it not?

The Witness: Yes.

The Court: Twenty-seven-a is the shoulder and 26 is the case itself.

Mr. Schmieding: That is right.

(Testimony of Herbert C. Clauser.)

The Court: Well, the drawing speaks for itself, Exhibit 22.

Q. (By Mr. Schmieding): In this patent the projectile case is shown as having a base and integral side wall, tubular side wall, is that right, Doctor? A. Yes, sir.

Q. The propelling charge for the projectile is shown as 35, is that correct? [179]

A. I couldn't see from here. Yes, sir.

The Court: Don't all of those items speak for themselves?

Mr. Schmieding: Yes, they do, your Honor.

The Court: On the drawing?

Mr. Schmieding: Yes, they do.

The Court: Exhibit 22.

* * *

A. Yes, sir.

Q. Will you please explain to the Court what those advantages are? [180]

* * *

A. Oh, yes.

Q. Does that integral structure have any advantage in that respect? A. Oh, definitely.

Q. Will you explain that to the Court, [182] please?

* * *

A. Surrounding—I don't get the question, [185] sir.

Q. This blue in 22.

(Testimony of Herbert C. Clauser.)

The Court: Are you referring to the patent figure now?

Mr. Schmieding: Yes. Referring to the patent figure, shows powder completely surrounding the left end of the fuse. Is there any advantage to that? [186]

* * *

Q. Are there any other material differences between the structure shown in the patent and that shown in Plaintiff's flare?

A. None apparent to the eye. [189]

* * *

Q. Yes. Would you say this flange rests upon the base, or not?

A. Essentially so, yes, sir, because that is—essentially so, because that is another precaution taken to prevent a flash-by, so it is resting on the felt and the [190] felt is resting on the base.

Q. Is that in the sense of a person resting on the floor, whereas he is really resting on his shoes?

Mr. Miketta: That is objected to, your Honor, as being argumentative.

The Witness: It is analogous to that.

* * *

Q. (By Mr. Schmieding): Will you point out in the patented structure a shell comprising a base and side wall of one piece of drawn metal? Will you point that out?

* * *

(Testimony of Herbert C. Clauser.)

The Court: Isn't what you just described the projectile case?

Mr. Schmieding: That's right. Did I say something else?

The Court: No. But I don't think you need to take up time on that. [191]

Q. (By Mr. Schmieding): I will refer you to Exhibit 22, again. Does defendant have a one-piece projectile shell? A. Yes.

Q. With an integral base? A. Yes.

Q. And side wall? A. Yes.

Q. Is there a compressed powder fuse in the base projecting into the shell? A. Yes, sir.

Q. And is there black powder surrounding that fuse? A. Yes, sir.

Q. And is there an annular wooden spacer block containing said powder? A. Yes, sir.

Q. Is there a washer? A. Where?

Q. A flare and a flare case mounted on the washer? A. Yes.

Q. Which washer is that? Is that the one at the right end, is that correct?

A. That's correct, sir.

Q. Does that flare have an exposed bottom to the black powder? A. Yes, sir. [192]

Q. Is there a parachute wire embedded in the top of the flare and coiled on the exterior thereof, exterior of the flare?

A. It is fastened to the covering, the tin cover of the flare, which is virtually being embedded.

Q. Does that flare have a washer mounted on it, on the flare?

(Testimony of Herbert C. Clauser.)

A. It has a washer mounted on the flare, yes, sir.

Q. Does the wire pass around that washer?

A. Yes, sir.

Q. Defendants' structure also has a parachute folded above the washer? A. Yes, sir.

Q. Is there a cork plug above the washer on defendants' structure? I refer you to Plaintiff's Exhibit 2.

A. A cork plug on the washer, is that the question?

Q. A cork plug above the washer.

A. Well, there is no cork in here, but its equivalent. It can be paper, it can be a composition, or it can be cork. It is just a question of which one is obtainable. Pressed paper.

Q. Is there any means to prevent the collapse of the parachute? A. In the defendants' signal?

Q. Yes. [193] A. Yes, sir.

Q. What is that in defendants' structure?

A. It shows a cylindrical rod which comes in contact with the last washer, the projectile case, and the parachute is wrapped around it, and it supports the washer, the closing washer.

Q. Is there a detachable closure member yieldingly forced in the open end of the shell and engaging the paper washer? A. Yes, sir.

Q. Defendants' structure employs a relatively short cartridge case as compared to the projectile shell, does it not? A. Yes, sir.

(Testimony of Herbert C. Clauser.)

Q. And there is a firing cap in the base of the cartridge case? A. Yes, sir.

Q. Will you explain where that is? Is that the firing cap that is indicated as such in the drawing that you had drawn?

A. Yes, in that central aperture of the drawing here, and it is red, marked firing cap.

Q. And defendants' structure also includes a propelling charge within the cartridge case?

A. Yes, sir. [194]

* * *

The Court: Doctor, these charges in the projectile case, are they under pressure, in Exhibits 25 and 28?

* * *

The Witness: It is packed in there rigidly.

The Court: Not under pressure? [196]

The Witness: No. Rigidly. The system must be rigid so as to keep it from mutilating itself.

The Court: The flare is sealed at the open end?

The Witness: That's right.

The Court: I suppose it is to waterproof?

The Witness: It is to waterproof primarily, and to hold it rigid.

The Court: But not to maintain any vacuum?

The Witness: No, sir.

* * *

The Court: Doctor, when you referred to pressure being exerted to produce a smaller burning section or smaller flare, do you mean pressure in the manufacture or pressure in the shell itself?

(Testimony of Herbert C. Clauser.)

The Witness: Pressure in the manufacture. That is, the casing which contains or holds it is put down in a mold for reinforcement and then the powder is put in there and then the mechanical pressure is brought to bear on it.

The Court: To press that composition of the powder, whatever it is——

The Witness: Whatever it is, but it is supported with a good, heavy mold or metal wall. [197]

The Court: That is called fire clay?

The Witness: Fire clay is put on the end as a stopper then. Fire clay is put on the end. That is where it comes in contact with the wire that is to keep the wire from melting off. [198]

* * *

The Court: How far below the parachute is the flare suspended while it is burning?

The Witness: Approximately three or four feet, your Honor, with shroud lines, lines fastened here and there, and then bringing them together to a focus and putting a wire at the bottom to keep that from burning the shroud lines. So that if it does fall or comes in contact with a flame, or the flare gets too close to the end, so it won't burn off.

The Court: The portion of the parachute which keeps it suspended in the air, what do you call, the canopy?

The Witness: That is the canopy of the parachute. That is correct, sir.

The Court: And the flare is suspended some three or four feet below the apex of the canopy?

(Testimony of Herbert C. Clauser.)

The Witness: That is right.

The Court: Or the crown of the canopy? [200]

The Witness: That is right; and fastened with a wire to avoid burning off of the attachment. [201]

* * *

Q. (By Mr. Schmieding): Dr. Clauser, will you please refer to the patent again, the patent? Fig. 2 shows a radial flange 27a on the base of the cartridge case and Fig. 4 shows a cartridge case in which there is an annular groove. Do you see that?

A. Yes, sir.

Q. Do you know whether or not this is interchangeable practice in the ammunition field, guns?

A. It is, yes, sir. [207]

* * *

Q. (By Mr. Schmieding): I show you a catalog and ask it be marked for identification as Plaintiff's Exhibit 31, catalog of the Kilgore Manufacturing Company, and ask you if that is a catalog produced by the plaintiff? A. Yes, sir.

Q. I refer to pages 15 and 16 in that catalog, and ask you whether the flare described on those pages is the same as the flare Plaintiff's Exhibit No. 7? A. Identically the same. [210]

Mr. Schmieding: I would like to offer that catalog into evidence as Plaintiff's Exhibit No. 31.

The Court: Is there objection? Received into evidence. Exhibit 31 for identification is received into evidence. [211]

* * *

Q. Give the same brilliance, is that correct?

(Testimony of Herbert C. Clauser.)

A. Somewhat. The same amount of brilliance? It would not necessarily follow that you would have the same amount of brilliance when you use a variation in your method of burning. It would all burn, but the matter of brilliance is a horse of a different color, that is, to say that the brilliance in all cases would be alike.

Q. There wouldn't be any material difference in the brilliance, would there, if you had the same composition?

A. Say you have it hanging, Mr. Miketta, say it is hanging in a position like that, the flames will be enveloping up along the side. The other will be standing in the reverse position where the flame shoots up and doesn't come [219] in contact with the bottom. It follows——

Q. I am not trying to trap you; I am just trying to get general statements here. In the pyrotechnic art it is customary to use relatively slow-burning powders to act as propellants, is it not?

A. Propellants, generally speaking, are black powder in some form or another. [220]

* * *

Q. (By Mr. Miketta): But is it not a fact, and do not the publications actually show, Dr. Clauser, that parachute type flares were shot from the Very and Webley-Scott pistols to heights of 200 to 400 feet? A. The Very star parachutes?

Q. I am talking about parachute types.

A. No, sir. I have never come across that, not with a parachute, no, sir.

(Testimony of Herbert C. Clauser.)

Q. Do you doubt that they were shot that high?

A. If they were shot, I would be surprised if you would also tell me that many of them did not work very well, because that was the headache. That is why we were called upon for something to take its place. That was all the trouble of the Army. It was then Army materiel, and I recall after World War I there was a million dollars worth of that materiel that was dumped into the Atlantic Ocean because of its failure to function.

Mr. Miketta: I did not get the first part of the answer. [222] May I have the reporter read it?

(First part of answer read by the reporter.)

Mr. Miketta: Thank you very much.

Q. When you are talking about a parachute flare, one of the characteristics of the candle or flare itself is the necessity that it hang together during the burning and not fall apart, isn't that correct?

A. That is correct, sir. [223]

* * *

Q. (By Mr. Miketta): Is it not a fact, Dr. Clauser, that back in 1929 people had described the use of a one-piece projectile case or shell, and I am talking about the patent in suit?

A. It refers to one-piece cartridge cases, but I have never run across any of the literature where it has referred to other—you say don't it refer—I have never come across any literature or in my experience where a one-piece projectile case was

(Testimony of Herbert C. Clauser.)

used at that time, not of that diameter, 37 millimeter. [226]

* * *

Mr. Miketta: Some of the testimony seems to be that they [227] are departing from that position, your Honor.

Mr. Schmieding: Some of these elements are old, your Honor.

The Court: All of them are old, aren't they, in the art? Aren't they?

Mr. Schmieding: All of them are old in the art, your Honor, but there are changes in these elements also.

The Court: All you are claiming here, as I understand it, is an invention in the case which houses the projectile, is that correct?

Mr. Schmieding: No.

The Court: And the case which combines with the case, I presume, which houses the cartridge?

Mr. Schmieding: Fuses are old, that is true.

The Court: As I understand, there was no claim of infringement over duplication of the inner contents of the flare.

Mr. Schmieding: Well, I am afraid I misunderstood it the other way. There are some new features in some of these old elements, slightly different shapes, that produce——

The Court: I am referring to the contents of the shells.

Mr. Schmieding: Yes.

The Court: Is there any issue here over the

(Testimony of Herbert C. Clauser.)

contents of the shells, either shell, that is, the cartridge shell or the projectile shell?

Mr. Schmieding: Yes. Not in the cartridge shell. There [228] is in the projectile shell. There are old elements just the same as there are old street-cars—— [229]

* * *

The Court: And this combination, it might produce a different result or a better result, but I am not asking you that.

Mr. Schmieding: That is true, that is true. And this combination where it is so shaped and so surrounded by powder and so encased in this wooden ring, that is all new.

The Court: But the elements are all old.

Mr. Schmieding: Each element is old. You will find an eyelet without a reinforcing element for the explosion that takes place, to take care of the explosion that takes place. You will find some kind of ring, but it is entirely different than the function that is performed by this particular ring in this case.

The Court: I was probably confusing your position with counsel for the defendant's opening statement. Defendant made the statement, as I understand it, that there was nothing in controversy here except the case.

Mr. Schmieding: Perhaps my statement was slightly broad, your Honor. I did not mean by that——

The Court: Mr. Miketta showed me that chart

(Testimony of Herbert C. Clauser.)

with the window shades on it, where you put one down, put one shade down and the other one up. Where is that, Mr. Miketta? [230]

Mr. Miketta: Here it is.

The Court: It was marked here. But, as I understood from his opening statement, the only thing that was in issue was the shell.

Mr. Schmieding: Now, that combination that is shown in that reference is not a projectile shell. It is a cartridge case which would function entirely differently than this projectile case with that fuse. The cartridge and projectile are altogether different.

The Court: I understand they are two different shells.

Mr. Schmieding: Yes.

The Court: But what I understood from his statement was that it was the containers and not the contents that were in issue, not the arrangement of the contents that were in issue here. Now, as I understand it, the entire mechanism is in issue here.

Mr. Schmieding: That is right, your Honor.

The Court: That is, not only the cartridge shell, the projectile shell, but the contents of both and the arrangement of them.

Mr. Schmieding: Yes. As your Honor stated at the pre-trial hearing, it is the claims that define the invention, and that is all that we are promoting here or insisting upon.

The Court: Well, I try not to get myself engrossed in the claims until I hear the evidence and

(Testimony of Herbert C. Clauser.)

understand the devices. [231] I do not like to get bogged down in language.

Mr. Miketta: May I ask at this time wherein in any of the claims in the patent in suit is there any reference to a tapered nipple or eyelet?

Mr. Schmieding: The claim calls for an eyelet having a reduced inner end.

Mr. Miketta: Which claim?

Mr. Schmieding: Claims 1, 2, 3.

Mr. Miketta: It does not say "a tapered end."

Mr. Schmieding: No, it does not say "a tapered end."

Mr. Miketta: Or "a dome-shaped end."

Mr. Schmieding: But you always interpret the language of the claims in view of the disclosure.

The Court: In claim 2 it is referred to as "an eyelet having a reduced inner end."

Mr. Schmieding: Yes, sir. What is meant by that is shown in the patent, your Honor.

The Court: Let us not get into any argument. I was attempting to shorten the matter. I do not want to interrupt you. Go ahead with your cross-examination.

Mr. Miketta: May I read this one admission from Exhibit G?

"That Louis L. Driggs, Jr., one of the alleged inventors of Patent No. 1,947,834 in suit herein, testified under oath in the case of the Kilgore Mfg. [232] Co., et al., v. Triumph Explosives, Inc., et al., in which case Patent No. 1,947,834 was in issue, as follows:

(Testimony of Herbert C. Clauser.)

“ ‘The Court: There is nothing new, is there, in the arrangement of the contents of the projectile? That is to say, this method of arranging the powder and connecting fuses and protecting certain parts by the felt washer and including a parachute and all that, is there anything new in that?’ ”

“ ‘The Witness: Not in the projectile itself, no, basically.’ ”

And similarly, there were other questions as to the contents, and even the inventor himself admitted there was no invention in the arrangement of the patent. I cannot see how counsel in this case, now that the inventor is dead, can now claim invention in the contents, particularly since the admission stated that Driggs had so testified. That is a stipulation upon which we can rely.

Mr. Schmieding: Again, that is a general statement and the man qualified that remark at the last there by saying “basically.”

The Court: Proceed, then, gentlemen. Proceed with your cross-examination.

Q. (By Mr. Miketta): Getting back, then, on this eyelet, Dr. Clauser, as I understand your testimony, this eyelet which [233] is item 4 contains a delay——

The Court: Let us not go over all that, Mr. Miketta, please.

Mr. Miketta: Pardon me.

The Court: I hear it so much I get confused. Don't go over it all. He has already told us all

(Testimony of Herbert C. Clauser.)

about it. Don't ask him anything except something that you think you ought to have in the record for the court of appeals or something you think that I have not heard and you want to be sure that I hear it. But if you ask it over again I get confused.

Mr. Miketta: Well, I probably annoyed your Honor and I am a little annoyed, because I want to bring out the fact that whether it is round or tapered does not make a bit of difference.

The Court: He has already told us why it is tapered, how it acts, why it is tapered to keep the pressure from blowing it out, so to speak, so it won't be premature ignition of the powder in the projectile shell. [234]

* * *

The Court: Dr. Clauser, anything that would stop that fuse from being——

The Witness: It would embody——

The Court: Just a moment, just a moment.

The Witness: It would help, but it would not be fool-proof as it is in this case. [235]

* * *

The Court: The patent speaks for itself. The patent speaks for itself, Mr. Miketta, unless there is some claim by the plaintiff that it does.

Mr. Miketta: I don't know, your Honor. I am just playing it safe. [236]

* * *

A. The answer is obviously yes. If it tumbles—there are times at which it will go strictly vertically,

(Testimony of Herbert C. Clauser.)

and there are other times at which it will tumble, which will be due to a lack of balance in it. I think it is only too obvious. [238]

* * *

Q. I notice that in some of these shells the cartridge is given a little taper. Now, what is the purpose of that taper?

A. The purpose of that taper is so that after the cartridge has been fired the cartridge base is readily ejected.

Q. So that you can withdraw the cartridge from the breech end of the gun?

A. If it is used as a distress signal for an on-coming vessel, a vessel seen at a distance, far away, it follows that people that are out in a raft will not be satisfied with shooting one signal, they would shoot a number of them so as to attract the attention of the other lighter, therefore you must have ease of extraction of that cartridge base, and I would say primarily it is for that. [239]

* * *

Q. And in order to attain that, it wouldn't make a bit of difference whether you made that projectile shell out of [241] one piece or whether you, let us say, screwed a bottom into a tubular shell and made certain that that joint was tight, isn't that correct?

A. That is not correct. That is where the trouble starts. [242]

* * *

But that is the fly in the ointment. It is so diffi-

(Testimony of Herbert C. Clauser.)

cult to do. That is where you get into trouble. When you put another piece on there, you must screw it in, as you say, have a thread on there, and it is a fact that that is done with difficulty. If you want to use a glue or an adhesive, why, that over a period of time will dry, and as it dries it contracts. If you use tar and you put it on there, these signals are thrown into the holds of a ship, or one side of an engine in a plane, and they are stored in hot climates and your tar will melt. It just does not take the place of that bottom there which comes as a result of that one piece of construction. I have stubbed my toes on that all my life.

Q. Dr. Clauser, I am assuming that with all your experience you wouldn't have used glue or some fragile cementing substance between the two, but as a manufacturing expedient you make the things out of one piece because that is the simplest and most economical way of doing it.

A. And the most efficient and the most fool-proof. It is the best way that I have yet run [243] across.

* * *

They had headaches with it.

The Court: By "this item" you are——

The Witness: The one in suit, the one-piece shell, that is, with that particular eyelet in there.

Q. (By Mr. Miketta): What I am driving at, Dr. Clauser, is that in 1929, prior to 1929, they had

(Testimony of Herbert C. Clauser.)

made tubular objects with an integral bottom previously, had they not?

A. Yes. You are referring now to the 25-millimeter parachute signal, aren't you?

Q. That had an integral bottom?

A. Yes. But it was fastened with tar, glue, and what-have-you, and just as soon as they dried, when evaporation took place, none of them would function any more, they had to throw them away. That is where it was necessary for someone to take up the job at that point and find something superior to that.

Q. Dr. Clauser, prior to 1929 you have seen metallic shells made—I am just talking about metallic tubular shells—made of one piece of metal where the bottom and the side walls were all one piece of metal, have you not?

A. Not unless you are talking about cartridge cases. Only in cartridge cases.

Q. Whether you call it a case or shell doesn't make any difference. I am talking about a tubular element, integral bottom. [244]

A. A cartridge case, after all, is the same as our cartridge case on there. When it comes to the side wall, the projectile on there, it is something else. That is the part that flies out, which is identical to a bullet that comes out of a metallic cartridge case.

* * *

Q. Does it make any difference, Doctor, actually,

(Testimony of Herbert C. Clauser.)

whether you call it a cartridge shell, whether it throws out of the gun or whether it stays in the gun ?

A. Yes, Mr. Miketta, it makes a big difference, whether you wanted to take a bullet up in the air, or whether you wanted to carry a parachute up there; a bullet will not [245] require a projectile case to carry it up there, but a parachute will take another part, that is, will require a projectile case to carry it up there so it will not open up until it gets to the place where it is most operative, and it therefore takes another part. In other words, it takes a projectile case plus a cartridge case. [246]

* * *

Redirect Examination

By Mr. Schmieding:

Q. If you use screw threads, Doctor, or if you would weld a base to the projectile, would that increase the weight of the projectile shell?

A. It will increase the weight, yes, sir.

Q. Why would it increase the weight of the projectile?

A. Because of the fact that you must have material, you must have stock at the bottom there that has more surface [250] on the sides so as to get your threads on there, and if you get more stock on there it will increase the weight.

Mr. Schmieding: That is all. [251]

(Testimony of Herbert C. Clauser.)

Recross-Examination

By Mr. Miketta:

* * *

Q. But the upper part of Exhibit 22 is not a reproduction of any Figure actually in the patent?

A. Oh, yes, it is. That is, it is here. These here are changeable, these here two, that is only the upper part of this.

The Court: Are you referring to Figures 1 and 2 of the [252] patent?

The Witness: Yes. That is Figure 1 in the patent as it appears there, and here, your Honor, that is only a part of this flare. This is where you do not have a parachute. This is for the mere shooting a fireworks up there and having a display from burning stars.

The Court: By "this here" you were referring to Figure 2 of the patent?

The Witness: That is the base of Figure 2. Figure 1 for the projectile of the base or 2. These two figures there are two different types of shells. They are interchangeable. [253]

* * *

Thursday, November 2, 1950
10:00 A. M.

Mr. Miketta: May the court please, in order to facilitate your Honor's comprehension of what I am going to talk about on some of the prior art points I have prepared, and would like to file, just an

outline of the various points, this outline including reference under specific headings to the record of this case, including the transcript and the admissions, etc., and the exhibits. Copy of that has been given to counsel.

The Court: Very well, you may file it with the clerk.

Mr. Miketta: Moreover, we have prepared and asked to file a supplemental memorandum of some points, law points, relating to this so-called unfair competition aspect, which points were not as thoroughly covered in our original points and authorities.

The Court: Very well, you may serve and file this also.

Mr. Miketta: They have been served on the other side.

May the court please, we have before us a patent which relates to a very crowded art, and the record shows that parachute type flares are not new and were used in the Very pistols during the first World War, as testified to by Clauser.

There are admissions to the effect that the Very hand gun is very old. That is the admission A-10.

Now, this Very hand gun was a breech loading gadget, just [257] like the guns that are before us now, and the shell used in that Very gun resembled an ordinary cartridge and it resembled the cartridges that we have here before your Honor.

In one of the exhibits, namely, Exhibit F-27, which is the history of military pyrotechnics in the World War—and it is our understanding that

Dr. Clauser knew the gentleman who wrote that and did some work in connection with this publication—and it appears on the last page of our Exhibit F-27, which was published in 1920, a picture of a Very gun and its cartridge.

Here is an enlargement, your Honor, of that plate from Exhibit F-27. It was blown up for the purpose of indicating that when it is enlarged from that very small reproduction which appears in the Exhibit F-27 it will be evident that the shell used in the Very pistol included a short cartridge case and a long projectile case, and that cartridge case has a flange at the bottom which, of course, is necessary in any breech-loading type of gun in order to retain that cartridge.

The shells were 35 millimeters in diameter and that means 1.4 inches in diameter, which is very close to the actual diameter of the shells now before your Honor, which I think are 1.45 or some such figure in inches. [258]

* * *

Parachute flares are shown in a large number of exhibits, F-1, F-2, all of those that are listed at the bottom of page 1 of the outline, and I would like to have your Honor look, for example, at this time at the patent Exhibit F-18, which is another patent procured by Messrs. Driggs and Faber, and under which the plaintiff operated. This particular patent expired in September of 1947.

The Court: I have it before me.

Mr. Miketta: Your Honor will note that that particular patent included a cartridge, which is the lowermost portion identified by the letter A in

Figure 1, and that cartridge was not provided with a flange, but with an annular groove, so that it could be used in a muzzle-loading gun. It had a primer or firing cap in the bottom of that cartridge, as is the case here. Now, fitting into that was a projectile shell, and that projectile shell is of a peculiar shape in that it fits snugly—the bottom portion of it fits snugly, as I am illustrating on the blackboard, and then goes out and [260] becomes a little larger at the top. So that there was more space available in this projectile case for the flare and parachute.

The bottom of this was heavier, as your Honor will note, and in that heavy bottom there was a nipple or fuse tube, which is identified by the letter E and E'. That containing the delay fuse and it has some holes in the side so as to permit the so-called spit, as Dr. Clauser referred to it, to ignite the powder or eject charge which surrounds it, in exactly the same relation as we have in our flares.

Above that they had the flare, I had better use red for that, the flare candle, and the parachute, and they had the upper seal, which closed the upper end. And you will note, your Honor, that in this patent they even included the stick or rod M in Figure 1, which is referred to in line 93 of the patent as the rod, whose function is as stated in the patent, "To prevent the unnecessary crushing of the parachute when the flare and parachute are ejected." That is the same function, of course, that we have now.

The charge here in the bottom of the cartridge was for the purpose of projecting the projectile to the necessary height. The fuse was to prevent the ejection charge in the bottom of the projectile case from going off until it reached the necessary height, and then that went off and the parachute and its flare were discharged. [261]

Now, I haven't shown them here, but we have certain gas checks, one between the parachute and the flare, which is identified in this patent by the letter J. We also have a gas check between the candle or flare itself and the ejection charge. That is indicated by the letter D. In this instance that wad or gas check, as they call it, is spaced somewhat from the bottom of the candle itself, but the candle, incidentally, has a bottom layer which they call the priming composition layer, that is stated on page 1, lines 80 to 82 of the patent, in exactly the same way that defendant and plaintiff use it, and it also includes a cable or shroud line, which is wound around the top or over the candle itself as clearly shown there just to the left of J in Figure 1, and then that cable extends around that gas check and connects with the parachute. Does your Honor see that cable?

The Court: Yes, I follow it.

Mr. Miketta: Now, if your Honor will just follow the hatch lines which show the cross-section of this projectile case from its bottom portion upwardly around the corner, your Honor will note that is all in one hatch line, indicating that that is made of one piece of material.

As far as material is concerned, these prior workers had described in expired patents the use of aluminum and various other materials. In this exhibit, F-18, [262] your Honor will note that on page 1, lines 56 to 57, it is stated that the container—they call it the container here—may be made of fiber or cardboard or even light metal if so desired.

So that we have a disclosure that light metal can be used.

As a matter of fact, on page 2 of the same patent in the second column, starting at about line 76, they talk about the desirability of making the parts as light as practical, so that there is less energy required in ejecting the container, less shock and recoil to the entire operation. At another point, which is the bottom of the first column on page 2, they say that the container should be light so that when it falls from say, 150 feet, or whatever height this projectile was sent to, it will not endanger persons or property there beneath, in exactly the same manner that Dr. Clauser referred to the container.

So here we have, your Honor, an expired patent showing, in my estimation, practically, if not all, of the elements as being old and in the same relationship.

One-piece shells are definitely old. I think even Dr. Clauser admitted it, and there is reference to the record at the top of page 2 of this outline.

* * *

Mr. Miketta: Exhibit K-2, I think, crystallizes

the issue very well, because, first of all, we have the pictorial representation of the projectile case, as it appears in the patent in Figure 1. Now we have, in addition, taken the cartridge, which is part of Figure 2 of the patent, and placed it immediately below, so as to show the relationship between these two. [264]

Now, there are admissions of record which I will call your Honor's attention to and would like to read in detail, which show that there is no invention to the arrangement of the contents, and in view of the expired patent F-18, which was filed more than two years before the patent in suit was filed, I do not see how anyone can contend that there is any invention in that arrangement.

So we can eliminate reference to the contents and simply look at the shells and the cartridge. As a matter of fact, the first three or four claims in suit have no reference whatsoever to the cartridge. They only talk about the shells.

Now, that is nothing but a single piece of tubular member with an integral bottom, or with this little eyelet or delayed fuse stuck in it with the shoulders of that delayed fuse resting against the bottom.

Your Honor has noticed that some of the cartridges and some of the shells have one shaped end and others have a different shaped end, whether there is a flange on it or whether there is an annular ring in it is just an adaptation.

We have this Powers patent, Exhibit F-3, on the other side of this tablet, Exhibit K-2, so that your Honor can visually compare. That is simply an

enlargement of Figure 1 of that patent. And Powers says in his own patent that that is a one-piece shell. [265]

* * *

Exhibit F-18, that one that we have been looking at, states that that container can be made of light metal. Well, of course, we all know that aluminum is a light metal.

But Exhibit F-16, which is another one of these patents, not cited by the Patent Office, now expired, still obtained by Driggs and Faber, definitely states that it can be made of aluminum; and that is on page 2, lines 30 to 32 of Exhibit F-16.

Exhibit F-17, which is another Driggs and Faber patent that the plaintiff operated under, and now expired, points [268] out that it is not necessary to make this container of the projectile shell of a different diameter. It can be of a uniform diameter. And in this exhibit that we have last referred to, Exhibit F-17, they had another formation in that the so-called cartridge case was practically as long or as long as the container. Now, that arrangement is shown and described in Exhibit F-17.

* * *

Exhibit F-21, your Honor, may be of interest to your Honor—another patent that was not cited by the Patent Office. F-21 is the British patent issued way back in 1869 and it talks about one-piece shells.

I would like to have your Honor look at the last page of the drawings, and particularly Figure 4 which appears in the upper right-hand corner. This

gentleman in this patent describes how to make a one-piece shell having thin sidewalls and a heavier base, and certainly such sort of a shell is shown in Figure 4. Then you subject that base, if you want to, to various other molding or pressing operations and put a hole in it or put a flange on it or do whatever you want to. [269]

* * *

There is no invention in the wooden disk or annular disk that they talk about, because there is an admission in this case to that effect. As a matter of fact, that is admission "B" (13) on page 4 of Exhibit G, wherein it was stated:

"That prior to the earliest date of invention by Driggs and Faber of that which is described and claimed in the claims"——

Claims so and so——

"there was described in printed publications and known to others——

"(a)—parachute type flares including a projectile case, an annular, wooden disk partially surrounding the expulsion charge near one end of such [270] case, a flare, a parachute, a wire or string connecting the parachute to the flare and a washer or gas check between the parachute and the flare;"——

Now, the answer reads as follows:

"Plaintiff admits that prior to the earliest date of invention by Driggs and Faber, there was described in printed publications and known to others a parachute type flare includ-

ing a projectile shell, an annular, wooden disk partially surrounding the expulsion charge near one end of the shell, a flare, a parachute, a wire or string connecting the parachute to the flare and a washer or gas check between the parachute and the flare. [271]

* * *

That plaintiff has actually disclaimed any novelty in the contents is clearly shown by admissions A-1, A-2, A-9, and D-6. They appear on pages 1, 2 and 3 of Exhibit G. Has your Honor read that?

The Court: Yes.

Mr. Miketta: The next point that I would like to call your Honor's attention to is there is no novelty in a short cartridge case and longer projectile case.

Of course that is now shown on Exhibit K-1, and it has been admitted in a number of admissions that are listed here on the bottom of page 3 of my outline, and that is clearly shown in Exhibits F-5, F-6, F-13 and F-14, none of which, your Honor, were considered by the Patent Office, to the best of my recollection. [272]

* * *

The use of seals, gas checks, washers, or wads, as they called them in the old days, well, that is customary practice and is shown by all these patents.

* * *

It is our contention, your Honor, that a man skilled in the art had available before him in 1929,

more than two years before this patent was filed, all the information that you needed to build a parachute flare. Flare compositions were well known. That is the record, page 217.

The weight and balance relationships were known and derivable from the laws of physics. The necessary size of parachutes was known. The effective value of propellants was known. And certainly they knew the strength of materials and how to draw them, and the fact that you could make a case or anything you wanted to out of one piece of metal.

* * *

Moreover, the claims, or many of them, are invalid for an aggregation. In claims 12, 13, 14, 18, 19, 20, 21, 22 and 23 they actually include "a firing implement" or the barrel of a firing implement, as an element of their so-called combination.

* * *

Mr. Miketta: They are not asserted by the plaintiff, your Honor, but I am referring to them because in our action for declaratory judgment we would like to have the whole thing thrown out and get rid of it, so they don't bother us again.

* * *

Here they take an old gun and try to claim that old gun or gun barrel in combination with their so-called new elements. [279]

* * *

The Court: You say you do not infringe claims 7 and 8 because there is no metallic closure.

Mr. Miketta: Open end, that is right, your Honor.

The Court: Do you think the use of cardboard or fiber [285] would avoid infringement?

Mr. Miketta: Well, there are other limitations in that claim, your Honor. Now, remember, in claim 7 you do not have reference to this particular type of eyelet. You will notice that they have eliminated all that if that is their invention, that element does not appear in claims 7 to 11, and in view of their admission that there is no invention in the arrangement of the contents, how can your Honor even give that any scope. Naturally, if it is not used, you cannot give it any scope. [286]

* * *

The Court: Is the evidence closed, gentlemen? What has been done this morning is largely argument.

Mr. Miketta: It was, but it was my method of presenting the prior art, and I think that is the most important thing before your Honor, as far as we are concerned. [298]

* * *

The Court: With the exception of that is the evidence closed? [299]

Mr. Schmieding: Except that I would like to have Mr. Clauser explain some of those prior art patents that were introduced and discussed by Mr. Miketta this morning.

The Court: Very well. This is by way of rebuttal now?

Mr. Schmieding: By way of rebuttal:

HERBERT C. CLAUSER

called as a witness by the plaintiff, in rebuttal, having been previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Schmieding:

Q. Dr. Clauser, I refer you to Defendants' Exhibit F-3, which is the Powers patent, No. 116,094. You heard what Mr. Miketta had to say about that patent; do you agree with what he said?

A. No, I do not.

Mr. Miketta: Pardon me, your Honor. I think the testimony of this witness should be directed to the patents themselves, in order to expedite procedure.

The Court: Are you referring to the Powers patent?

Mr. Schmieding: Yes.

The Court: That is Exhibit F-3.

Mr. Schmieding: F-3.

The Court: What do you wish Dr. Clauser to tell us about [300] that now?

Mr. Schmieding: Dr. Clauser would like to explain that the Powers patent is directed to a cartridge case and as it is constructed, as shown in that drawing, it is impractical as a projectile shell: He would also like to show——

The Court: It was not suggested, as I understood it, by the defendant that this cartridge case was a projectile shell, but merely to indicate the

(Testimony of Herbert C. Clauser.)

type of construction, all from one piece of metal, was old in the art, that is the way I understood it, with making an eyelet in the base and having a shoulder on the base.

Mr. Schmieding: That is as far as we think that patent can be construed, as merely showing a one-piece construction having a base and cylindrical side walls.

The Court: Did the defendant claim anything more for it?

Mr. Miketta: No, your Honor, we admit that there is a little flange at the bottom of the case shown by Powers, if that is their point. I think this is all argumentative. It doesn't require testimony. The patent speaks for itself, anyway.

Mr. Schmieding: Our point is, your Honor, if that same construction was used as a projectile shell it could not function, because the fuse operates entirely differently than [301] an explosive cap.

The Court: In view——

Mr. Schmieding: If the back of that cartridge case were subjected to the explosion to which the back of a projectile case was subjected, there would be a complete rupture of the projectile shell, and there would be a pre-ignition of the powder charge in the projectile shell.

The Court: As I understood it, it was merely suggested here that the Powers patent, Exhibit F-3, shows, as I have said before, the construction of a shell out of a single piece of metal with an aperture

(Testimony of Herbert C. Clauser.)

in the base for an eyelet, I assume it is called, with a shoulder or flange at the base.

Mr. Schmieding: That's true.

The Court: I understand the defendant doesn't offer it for anything more than that.

Mr. Miketta: Not for any more than it shows, your Honor. And may it be noted that claims 1 and 2 do not state what is in that eyelet, just the metallic structure that is claimed in 1 and 2.

The Court: You mean claims 1 and 2 of the patent in suit?

Mr. Miketta: Of the patent in suit, yes, your Honor.

The Court: Did you have any other questions you wished to ask Dr. Clauser?

Q. (By Mr. Schmieding): Dr. Clauser, I call your [302] attention to Defendant's Exhibit F-18, which is the Driggs, et al., patent, No. 1,776,755. Does that patent disclose a one-piece projectile having a integral base and side walls?

A. That does not. That is not a one-piece shell. That is not a one-piece projectile case. There is a stem to that, it is a larger flare and there is a stem at the bottom of about two inches with reduced size.

The Court: Is that stem an integral part of the walls of the case or the base?

The Witness: It is not. That cannot be drawn as such, as it is here today. That cannot be drawn, and it is a two-piece structure and it is connected, that stem is connected, your Honor, that is, structurally connected, mechanically connected, to that

(Testimony of Herbert C. Clauser.)

projectile case, and that larger bore extension. A construction like that, if I am repeating I apologize, cannot be drawn successfully today out of aluminum.

* * *

A. Yes, I want to add this for the court's pleasure: It is an aerial shell, this is not a shell that is intended to be shot from the ground into space, like Mr. Miketta says, it can be shot up in the air. It is just the reverse. It is [303] shot down. It is shot out from a plane. This is an aerial signal. It can be shot from the ground, but is not intended for that. We have to answer the question specifically. The United States Army, in the Aviation of the United States Army that is one of the shells that they buy, and we have manufactured them for them for years, and during the war, and I should like to point out that the purpose of this shell is for reconnoitering purposes, it is for landing before they liberate the big flare. This flare here, your Honor, will burn for a whole minute. It has a terrific light intensity, and approaches 100,000 candlepower. It is to use primarily for the scouting planes to locate a terrain on which it will be possible to land, and then they put out larger flares.

* * *

Q. (By Mr. Schmieding): At any time did Kilgore manufacture that particular flare to which you are testifying out of one piece of drawn aluminum?

(Testimony of Herbert C. Clauser.)

A. No, sir. They are connected. The cartridge case at the bottom is one piece, which corresponds to the cartridge case in the other items, but this is definitely two-piece construction, the projectile case. [304]

Q. Dr. Clauser, I wish to call your attention——

The Witness: Pardon me. In the patent——

The Court: Which patent?

The Witness: Patent 1,776,755, Driggs, Jr., et al.

The Court: Exhibit F-18 here.

The Witness: I don't have the exhibit number on mine.

The Court: Very well. What were you about to say?

The Witness: I want to point attention, in support of my statement, to Paragraph 3, where it refers to "this container B has reduced hollow stem b"——

The Court: That is in the second column, beginning at line 62?

The Witness: Beginning line 62. As you will read, you will find when you get to 65 it says,

"connected to the stem b by the annular shoulder * * * ."

It says "connected." I apologize, but I wanted to call that to your Honor's attention.

The Court: Yes. Do you have any further questions of the doctor?

Mr. Schmieding: Just one more question.

Q. (By Mr. Schmieding): Dr. Clauser, do you

(Testimony of Herbert C. Clauser.)

find all of the elements called for in the claims in suit in the defendants' structure? [305]

A. Yes, sir.

Mr. Miketta: That is obviously calling for a conclusion and opinion of this witness, your Honor.

Mr. Hann: We can go into it element by element, if you want to take up the time.

The Court: Do you wish him to spell it out?

Mr. Miketta: No, your Honor.

The Court: It is a matter of argument.

Mr. Miketta: I think it would take up too much time.

Mr. Hann: We can go into it element by element, but I see no purpose in that.

Mr. Schmieding: That was the intention of asking the question in that way, to save time.

The Court: Counsel has withdrawn his objection, as I understand it.

Mr. Miketta: Yes.

Mr. Schmieding: Those are all the questions I have.

Mr. Miketta: Just one question. [306]

* * *

Mr. Schmieding: In the present case we have a new projectile case in combination with some old elements that produce a result never attained before. [314]

* * *

The Court: Well, in accomplishing this result we are [315] bearing in mind all the time, is it your contention that the scope of this patent in

suit is such that no one, in order to accomplish the same result, can use a one-piece projectile case?

Mr. Schmieding: Yes, that is what I maintain. That is what the Patent Office recognized as the invention here.

The Court: What if they used two pieces and welded them together?

Mr. Schmieding: If you used two pieces and weld them together? As Dr. Clauser testified, you would require such amount of heavy material here at the junction of the base and the shell which would require a heavier casing, with the result that it could not be elevated to the same extent, unless a larger charge of powder were used. And if it was elevated to that extent, it would be very dangerous if it dropped and hit someone. That is one of the reasons they made them out of cardboard. [316]

* * *

The Court: Would the projectile function at all without the cartridge case?

Mr. Schmieding: It would not function at all without the cartridge case, unless some other means were provided for igniting the fuse.

I think that is also disclosed in the patent where they have a hand scratcher.

The Court: That wouldn't achieve the result which is [330] claimed?

Mr. Schmieding: No, it would not achieve the same result.

The Court: All right. Then in order to find a combination which achieves the results for which the invention is claimed, we must move from claim

4 over to some claim that combines the cartridge case, must we not?

Mr. Schmieding: To achieve the same result?

The Court: In order to achieve the result?

Mr. Schmieding: To achieve the result there must be a cartridge case, that is true.

The Court: That is part of the combination, essential part of the combination, isn't it?

Mr. Schmieding: That is part of the combination.

The Court: Because this projectile case is an improvement for the intended purposes only because it is built to withstand the shock or force that will push it to an altitude of 150 feet as a minimum?

Mr. Schmieding: That's true. [331]

* * *

The Court: So in order to produce a combination that will achieve a better result than was achieved in the prior art of flares, must not you have the cartridge case as a part, an essential part, of that combination. So that, if you please, if a person wanted to copy this device without using the cartridge case, he could not be said to infringe?

Mr. Schmieding: Yes. But the law goes further than that, you Honor. The manufacturer of that device could contribute to infringement by selling this to the manufacturer of the completed shell.

The Court: Oh, that is a different matter now. I am talking about a different application, a different use of the devise, a different combination, if you please.

Now, a contributory infringer who manufactures

the projectiles with the specific intent that it be combined with [339] the cartridge case, then he is in fact the left hand or the right hand of the infringer, so to speak, isn't he?

Mr. Schmieding: That is true.

The Court: And he is *particeps criminis* or certainly a joint tort feisor—more accurately a joint tort feisor—and the law holds him liable because he is, in cooperation with someone else, an infringer. But the man who manufactured the projectile case for the 4th of July fireworks would not be an infringer, would he?

Mr. Schmieding: Yes, I would say he was, your Honor.

The Court: You are claiming a broader invention than the prior art could possibly justify, aren't you?

Mr. Schmieding: He makes it possible for someone to infringe by making a combination as claimed in claim 4.

The Court: It is not the possibility, it is wilful tort. Infringement and contributory infringement are wilful torts, aren't they?

Mr. Schmieding: I never heard of it, but that sounds very sound to me, yes.

The Court: It must be intended. If someone were manufacturing a single-shell projectile with contents identical to your client's for 4th of July celebrations and that was the only use to which they were put, could you claim infringement of this patent?

Mr. Schmieding: I think I would. [340]

The Court: I know you probably would, but I mean could you reasonably do so?

Mr. Schmieding: I think you could.

The Court: Patentees always proceed upon the assumption that it doesn't cost any more to claim, but would there be any reasonable basis if you went into court and said: "Why, this man is infringing." Would not the court say, "Well, where is your invention? What is the invention [341] here?"

* * *

The Court: And I would say it would be the most narrow of those claims that could be sustained, the most definite and most narrow. [348]

* * *

Friday, November 3, 1950—9:30 A.M.

We feel that claims 8 and 11 define the invention in its narrowest aspects. There is some difference between claims 8 and 11. Claim 11 includes the stick which prevents the collapse of the parachute.

I would like to point out——

The Court: Does 8 contain that?

Mr. Schmieding: No. 8 does not contain the thrust member of the stick which prevents the collapsing of the [350] parachute.

The Court: 11 does?

Mr. Schmieding: That's right. Claim 11 was rejected by the Patent Office, and then after the word "integral" was inserted in line 64, so as to define the one-piece structure, it was allowed.

The Court: What about claim 10?

Mr. Schmieding: Claim 10—well, claim 11 is the

same as claim 10, but claim 11 has the extra element, namely, the detachable closure means for the shell, which in plaintiff's and defendants' structure are the cork ends.

The Court: Is that omitted in claim 10?

Mr. Schmieding: The detachable closure means is omitted in claim 10.

The Court: Then is it your view that the combination is not complete as described in claim 10?

Mr. Schmieding: Yes, I think the combination is complete in claim 10. The means in claim 10 for preventing the collapse of the parachute, of course, would include the end wall of the flare. [351]

* * *

The Court: What does that mean, make the cartridge case or the gun barrel?

Mr. Schmieding: That means it constitutes part of the gun barrel. When it is put inside of the breech of the gun the cartridge case really provides the sidewalls for the rear end of the projectile case. I believe the claim is more applicable to such constructions as shown in Fig. 4 of the patent in suit, in which the cartridge case is co-extensive with the projectile case. [352]

* * *

The Court: What about claim 7?

Mr. Schmieding: Claim 7 is exactly like claim 8 except it omits the last limitation, which is "means on said base of the cartridge case for positioning said shell and case in a fire implement." That refers to that shoulder 27a on the extreme rear end of the cartridge case.

The Court: It is your view, then, as I understand it, that claims 8 and 11 more accurately and more completely describe the device in controversy here than any other of the claims?

Mr. Schmieding: Yes. Of course, I am not excluding claim 10. That is not limited to the detachable closure means. But I think that is immaterial at the present time because defendant also uses a detachable closure means at the end of his flare or his projectile case. In other words, I believe that claims 7 to 11, inclusive, are valid, but I think we can reduce the issues to perhaps claims 8, 10, and 11, excluding claims 7 and 9 and the first five claims.

The Court: In other words, your position, I take it, in summary, is that claims 7, 8, 9, 10 and 11 are valid claims?

Mr. Schmieding: Yes.

The Court: But that there may be some doubt as to infringement of claims other than 8 and 11?

Mr. Schmieding: No, I believe each of these claims [353] is infringed, but as I understood your Honor yesterday, we wanted to limit the issue as nearly as we could, therefore, we chose to base our case on claims 8, 10, and 11. [354]

The Court: If the scope of the claims were limited to the precise combination described, would there be any infringement of claims 7 and 9?

Mr. Schmieding: I didn't quite understand your question.

The Court: Does the defendant infringe claims 7 or 9 if limited to the precise combination described?

Mr. Schmieding: Yes, the word "metallic" is in claim 7; a detachable metallic closure.

The Court: It is also in claim 8, isn't it?

Mr. Schmieding: And in claim 8. And in claim 9, 10, and 11 we find the definition of an annular groove, and our position is that the flange and the annular groove are recognized equivalents in the art.

The same about "metallic" in claims 7 and 8. The idea was to close the end of that case by some means to prevent the ingress of moisture laden air or water. [355]

* * *

The Court: We get down to this patent in suit, and the plaintiff claims a combination of entirely old elements in a way so as to produce a new result. Let's take it from the basis of the combination described in their claims 8, 10 and 11, which Mr. Schmieding mentioned this morning. Let me put it this way: the combination appears to be useful and new as a combination in this field. Would you concede those two elements?

Mr. Miketta: No, your Honor, and I will get to the answer to your question, but let me first call your attention to this: We are talking about a new element in this discussion, and I think that is a wrong approach, and perhaps that language is confusing.

The Court: I am not considering any new elements; I am considering old elements in a new combination. [367]

* * *

The Court: There is no question but what this is a better device than anything that had been used theretofore? Is there any question about that?

Mr. Miketta: It is a better device because they made this out of one piece.

The Court: Yes, and the defendant has paid it the tribute of copying it.

Mr. Miketta: Certainly, any mechanic would know that.

The Court: Now, there is a question. Now, let's get down to a fine point. There was a storage battery before Ray-O-Vac, it worked; what did the patentee do there?

Mr. Miketta: He did not make an old element that formerly was made in two pieces out of one piece, your Honor; and that is your specific problem here.

The Court: He took some old elements and put them in a new combination, didn't he, and what was the new combination?

Mr. Miketta: Let's stick to the facts of this case, your Honor. Here we have an old projectile case made out of two pieces, and these people came along and made it out of one piece.

The Court: All right. Now, will you distinguish that for me, show me why that is not analogous to what was done in the battery case, [368] Ray-O-Vac?

* * *

The Court: Mr. Miketta, is it your belief from the evidence here that the court should find that flares taught in the prior art can be shot at sea just

as effectively and can be seen just s well with the same results as with this new metallic cartridge?

Mr. Miketta: Yes, your Honor.

The Court: Is there anything here to show that? Isn't all the testimony to the contrary?

Mr. Miketta: Has your Honor any evidence to show——

The Court: Dr. Clauser testified that——

Mr. Miketta: I have read his testimony very carefully, your Honor, and I don't find that. He is a witness that has been with the plaintiff for a long time, yes, but why didn't they produce some tests, your Honor? Why didn't they show it? What is good proof? What is evidence? Suppose it is cheaper, your Honor, does that make it an invention, just because it is cheaper? I would say not. There must be a new relationship between the elements, a new mode of operation.

The Court: There is no suggestion here that a more economical method is necessarily involved in this.

Mr. Miketta: As far as shooting it up in the air, your Honor, remember the patent in suit says that the principal use [390] is in a shell, which is apparently the kind of a shell that is shot from an airplane. That was developed during the so-called rebuttal yesterday. And the patent in suit does make that statement right there, the principal use is in that form of a cartridge that doesn't have the external flange at the bottom, but the type of cartridge that has the annular groove.

If your Honor wants to check that again, that

appears on page 2 of the patent, lines 18 to 19, where it specifically refers to Figure 4. Figure 4 is the type of shell that is shown in the earlier Driggs and Faber patents.

The Court: Of course, line 20, page 1 says:

“It is a further object to provide such a flare which can be used with a breech-loading pistol, as well as with a muzzle-loading pistol.”

Is there any inference properly to be drawn from the Coast Guard specifications in these matters? Should the court draw the inference that the Coast Guard would specify the best and safest device?

Mr. Miketta: If you only have one manufacturer, your Honor, very probably that manufacturer is highly instrumental in drawing up the government specifications. That is only normal. There may be better devices.

The Court: If this is not the best known to the art, why would competition come along and instead of offering [391] something better just copy what was there? Isn't that tribute itself a compliment?

Mr. Miketta: It isn't a tribute to invention; it is a tribute to commercial success, perhaps.

The Court: Isn't it a compliment, a tribute to the contention or concession to the contention that this represents the most advanced and most improved state of the art?

Mr. Miketta: If we eliminate from our thoughts actual invention, perhaps it is, perhaps it is. Perhaps this is a very fine shell. It must be. It passes

the specifications. The government seems to be happy with it.

The Court: And it must be a better shell or better flare than anything theretofore known to the art.

Mr. Miketta: I wouldn't say that, your Honor.

The Court: Why wouldn't the Coast Guard specify something as an alternative, perhaps, something known in the prior art?

Mr. Miketta: There are reasons. In the first place, they may not have anybody engaged in this business. Plaintiff here may have put everybody else out of business anyway.

The Court: Let's assume anything you wish to with respect to the plaintiff and its methods, the fact still remains that if the Coast Guard said, "We don't want this, what we want is that earlier model," that is what the Coast [392] Guard would get, isn't it? If the Coast Guard said that, moreover, isn't it a fair inference here that not only the government would buy nothing else, but private individuals would buy nothing else? In other words, what the Coast Guard says with respect to this item controls the entire market, doesn't it?

Mr. Miketta: Yes. But remember this. I have been reading the specifications, and they don't say that the projectile case has to be of one piece, they only say that it has to be made of metal, and they don't specify aluminum.

Mr. Schmieding: That is our point. [393]

* * *

That disposes of the first cause of action asserted in the bill of complaint.

As to the cause of action for unfair competition, I find that the defendants have copied the plaintiff's device, not only internally but externally, with a few minor exceptions, both functional and non-functional. [403]

* * *

As to the counterclaim set forth in the Second Amended Answer, the counterclaim for declaratory judgment, is there any occasion, Mr. Miketta, for the court, in view of the judgment ordered here, to declare any further rights and duties of the parties under this patent?

* * *

The Court: Are the defendants doing anything that is likely to infringe those claims? The plaintiff does not claim or contend that defendants are infringing or have infringed any claims other than claims 1, 2, 3, 4, 5, 7, 8, 9, 10, and 11, as I understand it. Is that correct?

Mr. Schmieding: That is right, your Honor. And——

The Court: The court has held that claims 1, 2, 3, 4, and 5 invalid as not constituting invention because, as I read them, they are too broad and do not constitute the complete combination here which is essential to achieve the new and improved result which is achieved by the combination described in claims 7, 8, 9, 10, and 11.

The Court having held valid claims 7, 8, 9, 10, and 11 and having held invalid claims 1, 2, 3, 4, and 5, that would leave claims 6, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, and 23, would it not? [404]

* * *

The Court: Is there anything the defendants are doing which could conceivably be charged as an infringement of any of these remaining claims?

Mr. Miketta: Yes, your Honor.

The Court: For instance, I notice in some of them there is the use of a thread, several of them.

Mr. Miketta: That is correct.

The Court: There is no thread being used, is there?

Mr. Schmieding: Your Honor, we could not again attack the defendants on this patent. It is *res judicata*. This patent has been in court as to those defendants. We could never at a later date charge infringement of other claims.

Mr. Miketta: Claim 6 was withdrawn, your Honor, on the ground that we do not use that threaded base. But if your Honor has come to the conclusion that we infringe claim 9, for example, then we possibly infringe all of the claims, because claim 9——

The Court: I will hear you on claim 9.

Mr. Miketta: Beg pardon?

The Court: But I could not elicit any discussion in argument about that, so I will hear you on claim 9. [405]

Mr. Miketta: Claim 9 does not include a one-piece case, your Honor. If we infringe that, if that is a valid claim as your Honor has indicated——

The Court: Well, if it does not, I overlooked it. I expect that kind of help from counsel.

Mr. Miketta: I have attempted to give your Honor all the possible help. I have asked to be

given an opportunity of explaining our position and I thought your Honor had listened.

The Court: You did, but I heard nothing before of any suggestion that claim 9 did not include a one-piece shell. I heard no discussion of any of the claims from you in detail after counsel and I had discussed these others. If that is true, a greater burden is upon the plaintiff to tell me that than it was upon you. [406]

* * *

The Court: That is addressed to the issue of infringement, is it not, and not validity?

Mr. Miketta: All right. We are talking about infringement now. Claim 6 is not infringed because of a threaded base and they admitted it by withdrawing that claim, and they withdrew claims 12, 13, 14, and 15 because they included either threads or an annular groove, admitting that that was a material limitation, your Honor. Then I do not see how your Honor can say that that is not a material limitation [407] in claims 10 and 11.

The Court: Well, let me hear from the plaintiff on it. I have not heard that argued yet. I will be glad to hear you.

Mr. Schmieding: We never withdrew these claims because certain of the claims calling for an annular groove——

The Court: What is the difference between whether it has an annular groove or does not have an annular groove?

Mr. Schmieding: None whatever, your Honor.

They are interchangeable. Some ammunition has one, some ammunition has the other. [408]

* * *

Mr. Schmieding: Your Honor, Dr. Clauser testified that there is a signal gun manufactured and used that takes either the annular groove or the flange on the end of the shell.

Mr. Miketta: We are not being sued on a patent on a gun that was made recently.

The Court: No. It is a question of the uses to which this combination is put. It is a certain combination which achieves what I have found to be a new and better result.

Mr. Miketta: Does your Honor consider the stick to be an important element of that combination?

The Court: I do not consider it to be an indispensable element of it.

Mr. Miketta: It does not appear in claims 7 and 8, your Honor. [409]

* * *

Mr. Miketta: I also wish to call your Honor's attention to the fact that claims 8 and 10 do not provide for an end closure for the entire shell, and obviously that is a necessary element or the contents would be exposed.

The Court: Isn't that essentially shown? All the contents would fall out if it wasn't closed.

Mr. Miketta: I don't know where your Honor is drawing the line between essential elements and non-essential. There are no gas checks involved in

either clamps 8 or 10 or 11, and we have been told that they are very necessary for the proper functioning of the device, but those gas checks are not included in those claims.

The Court: Do you have any other distinctions you wish [410] to point out? I wish to hear them all.

Mr. Miketta: Very well, your Honor. There is no end cap, incidentally, in claim 7 mentioned. Claims 9, 10 and 11 all refer to——

The Court: 9 has been held invalid.

Mr. Miketta: Pardon me. There is that missing stick in 7 and also the end closure is missing in that. I have mentioned the missing parachute stick and the missing gas checks, and the missing end closure in claim 8. There are no gas checks and no end closure in claim 10. There are no gas checks in claim 11. Claim 12—shall I continue?

The Court: No, I am speaking about the claims in issue now. All those things are shown in the drawings, are they not?

Mr. Miketta: They are all shown in the drawings of prior patents, your Honor.

The Court: There isn't anything new here except in combination.

Mr. Miketta: The combination is shown in the prior patents.

Mr. Schmieding: May I suggest to your Honor that the remaining claims not in issue here be held valid and not infringed?

The Court: What do you mean by the remaining claims in issue? [411]

Mr. Schmieding: Not in issue. Claims 6 and 12 to 23, inclusive.

The Court: I wouldn't hold them valid unless I heard the arguments against the invalidity, I mean arguments as to their invalidity.

* * *

The Court: What do you think of claims 7 and 8, as to whether they are infringed?

Mr. Schmieding: Surely they are infringed, your Honor. It is not necessary to include every element in a claim. That is the reason we have various claims.

The Court: There has to be enough to work the combination, doesn't there?

Mr. Schmieding: That is true, and anyone skilled in the art knows that there has to be gas checks. [412]

* * *

Mr. Schmieding: And that claims 10 and 11——

The Court: Claims 10 and 11 I hold to be valid and infringed.

As to the remaining claims, I don't perceive any necessity of making any declaration with respect to them, Mr. Miketta.

Mr. Miketta: Except that we had asked for a declaratory judgment as to those claims.

The Court: I know, but is there any reason to do it, is there any reason except that you just want it done? Is there anything in the record that shows that any of these are even remotely connected with the plaintiff's business? Is there any likelihood that the plaintiff has any business reason?

Mr. Miketta: Yes, your Honor.

The Court: Point it out to me. Is there anything in the evidence that shows that he is manufacturing anything that might be said remotely to infringe these remaining claims?

Mr. Miketta: If we infringe claim 10, your Honor, then [414] we probably infringe claim 13 and 14.

The Court: Why?

Mr. Miketta (Continuing): But in those particular claims they have included as a part of their necessary combination a firing implement. I am reading from claim 13 on page 3 of the patent, line 89:

“A firing implement having means for detachably attaching said cartridge case therein,”

The Court: That firing implement is in claim 12.

Mr. Miketta: In claim 12 there is no stick, again, your Honor. [415]

* * *

That disposes of it in the counter-claim. [416]

* * *

Mr. Miketta: Claims 10 and 11 are the only claims now, is that correct?

The Court: Those are the only claims held valid and infringed.

Mr. Miketta: May I have the privilege of petitioning for a rehearing on those two, your Honor?

The Court: It is always in order to move for a new trial under the rules.

Mr. Miketta: I don't think that is necessary,

because the evidence is all before your Honor. It is simply a question of perhaps reviewing the facts of this case and presenting the facts to your Honor so that your Honor is convinced as to the decision that should be reached.

The Court: Fairly construed I think those claims describe the combination and all the essential elements of it with sufficient specificity to enable anyone versed in the art to practice that invention.

If you wish to make a motion for a new trial and point out any errors——

Mr. Miketta: I will consider that, your Honor.

The Court: I will be glad to entertain it. Or if you wish to argue the matter upon objections to the findings, you may present it that way.

Mr. Miketta: That may be the time to [417] do it.

The Court: I will be glad to entertain it. We have it down to fine points now, and perhaps that might enable you to make a more helpful presentation. You may present your objections and any argument on it within five days, under the rule. If counsel wish to answer it, how long will it take you to answer it?

Mr. Schmieding: Well, your Honor, I am living in Columbus, and I would like to know whether or not he is going to file these, so that I can go back to Columbus——

Mr. Miketta: I am going to object to the findings, very definitely.

The Court: Suppose we do it this way: If you

have a further memorandum to file on the question of validity or infringement of the claims just held valid, how much time do you wish in which to file it?

Mr. Miketta: May I have until next Wednesday, your Honor, Wednesday or Thursday of next week? I think I can get that out by Thursday of next week. That will be November 9th.

The Court: Very well. You may have until Thursday, November 9th, in which to serve and file a memorandum on the question of validity and infringement of claims 10 and 11 of the patent in suit.

Do you wish to see that memorandum before you prepare the findings and conclusions? [418]

Mr. Schmieding: No. I think we will be able to prepare our memorandum.

The Court: Then, how much time do you wish in which to reply, five days?

Mr. Schmieding: I think that will be sufficient.

The Court: Very well, that will be the order as to any further memoranda, and the order as to the preparation and submission of the proposed findings and conclusions and judgment will [419] stand.

* * *

Monday, January 8, 1951—2:00 P.M.

* * *

The Court: In what respect would his device differ?

Mr. Schmieding: The device would differ in this respect, that the patent in suit is drawn to an ap-

paratus that functions differently from the expired patent. [2*]

* * *

The Court: And that would be the only difference?

Mr. Schmieding: No. I would not——

The Court: As far as difference between the two patents is concerned.

Mr. Schmieding: No. There is this difference also, if you will take notice, in the patent in suit we have a charge of powder—I will use the Exhibit 25 as an example.

The Court: I have a cross section of it. Well, I have the drawings here.

Mr. Schmieding: We have an expelling charge interposed between the end of the projectile case and the interior cartridge case, that is, there is black powder inside of that chamber, whereas in the expired patent there is no powder in the chamber A.

The Court: The chamber A?

Mr. Schmieding: In the expired patent, that is true.

The Court: Chamber A, is that in issue? Oh, yes. What expels the flare?

Mr. Schmieding: Well, I imagine merely a blank cartridge.

The Court: To expel the flare? [3]

Mr. Schmieding: That is right.

The Court: Of the projectile case.

Mr. Schmieding: That is correct.

The Court: How high would that expel it?

Mr. Schmieding: A very short distance; and that is one of the differences between this present invention and their earlier patent.

The Court: What has been done is this, isn't it: That the reason powder was not used in the expired patent was because the projectile case would not stand that pressure, would it?

Mr. Schmieding: That is right, your Honor, if you wanted to project it at the height that was desirable.

The Court: But under the expired patent could you project the projectile case to a high altitude?

Mr. Schmieding: No, you could not. I would like to—

The Court: But if you put powder in there, it would be expelled to a higher altitude, would it not, the projectile?

Mr. Schmieding: It would be expelled to a higher altitude, but that is not the only problem you have. You have to hold a gun and you cannot put sufficient powder in there to expel that to such a height. The recoil would be such that one could not hold it. If you take notice, this gun is substantially large in itself. Now, you can only withstand a certain amount of recoil. If you built that [4] projectile case strong enough, if you built it out of two pieces so it would have such a weight that to raise it at the height desirable, you could not withstand the recoil.

This is placed, as you recall, in life boats and used merely as a distress signal. As Dr. Clauser testified, apparatus made in accordance with that

expired patent was never used for projecting a projectile any substantial distance, and the patent so states.

The Court: I understand that. I recall that. But what is the claimed invention here is merely making a one-piece projectile case.

Mr. Schmieding: That is right, your Honor.

The Court: That is my problem. As a practical matter no one could build a flare, even using the precise device of the expired patent, if he put it in the single piece; he would be infringing the patent in suit.

Mr. Schmieding: That is right.

The Court: According to plaintiff's contentions here.

Mr. Schmieding: That is right, your Honor. It is that idea that they finally conceived after building the flares that were shot out of airplanes. This is an airplane type shell. There is no intention to lift it up in the air. You are shooting it out of the airplane in this expired patent and it merely floats to the ground. You just merely use enough expelling charge to get it away from the airplane. You are not interested in expelling it very high into the [5] air.

The Court: Well, this device, the device taught by the patent in suit, would serve the same purpose as the device taught in the expired patent, would it not? It would serve it better, wouldn't it?

Mr. Schmieding: Yes, it will service it better.

The Court: But the converse of that is not true, is it?

Mr. Schmieding: The converse of that is not true; that [6] is, it is just impossible to take this old shell and shoot it up into the air.

* * *

The Court: And we are giving monopoly of the entire field for that, because no one who uses one piece instead of two can do so without infringing.

Mr. Schmieding: That is right. But the problem was always there. No one saw how to solve that problem. Dr. Clauser says it was a stumbling block while he was with the Triumph Explosive Company.

The Court: Yes.

Mr. Schmieding: Although making cartridge cases out of one piece was known, but no one brought this one-piece shell into this particular field. It is just the last step, the last step that changed devices that could not function, could not perform the desired result, to one that did perform that desired result.

The Court: To put it another way, in the language of the cases, wasn't that development clearly anticipated by all the prior art? [7]

Mr. Schmieding: No, I would not think so. It is the idea of bringing in this element into this particular combination that no one conceived.

* * *

Mr. Schmieding: I think there is material difference between our case and those cases. In that case, in the Stewart Warner case, the man was claiming a combination which was all shown in

the prior art. He was claiming a nipple which was on an automobile, he was claiming a grease gun, and he was claiming a particular type of jaw. Now, they did not get any new results.

The Court: He got a better result, did he not?

Mr. Schmieding: The prior art, it caused the greasing of those, the shooting of the grease into the bearings. The pump worked in the same way as it did in the prior art. It would be analogous to us claiming the pistol in our combination. [8]

* * *

Mr. Schmieding: That is right. And we did something that nobody else was able to do before.

The Court: You achieved a better result. [9]

* * *

The Court: How do you distinguish that Toledo Pressed Steel v. Standard Parts case in 307 U. S. 350?

Mr. Schmieding: In that case the man did absolutely nothing. The prior art showed that it was old to have a flare with a wick and a particular type of cap over the wick. This cap had a cover on it and holes in the side for the admission of primary air and for the outlet of flame.

* * *

The Court: Didn't he produce one that would not blow out in the wind?

Mr. Schmieding: No.

The Court: Or one that was less likely to blow out in the wind?

Mr. Schmieding: No. The prior art showed that

it was old to use that same cap, the same type of design.

The Court: What did he claim as his invention?

Mr. Schmieding: Yes, he claimed that was the invention.

The Court: What was an invention?

Mr. Schmieding: Apparently what he thought was the invention there was to take this small lamp-lighter's flare [10] that the lamp lighter used to carry around on the stick, and take that cap off of that particular flare and put it on his bomb shaped flare.

The Court: Then it produced a better result, didn't it?

Mr. Schmieding: He did not produce any better result than the lamp-lighter flare produced. It was not extinguished by rain or by wind. [11]

* * *

The Court: Let me hear from Mr. Miketta, unless you had something further. [13]

* * *

The Court: Let us assume now that you have demolished the old authorities, and rather have demolished them beyond opposition, too, or have demolished any opposition to them as sustained in your position here. Are you able to dispose of the Ray-O-Vac case the same way in 321 U. S.?

Mr. Miketta: You know, your Honor made me look up the District Court opinions in that and really follow that case and dig up the facts, and there is one quirk in that case which I did not men-

tion before. Your Honor probably has read it and will recognize it. The District Court's opinion, incidentally, had one very good statement in it, that every patent must be considered on its own merits.

The Court: That is a very good statement. Will you explain to me how Mr. Justice Roberts could have written the opinion in the Stewart Warner case in 303 U. S. 545, and having that opinion in mind could also have written the Ray-O-Vac opinion in 321 U. S. 275 six years later?

Mr. Miketta: That is where the District Court, I think, [15] made a very wise statement by saying that every patent must be considered on its own merits in the Ray-O-Vac case. If your Honor were to read the District Court opinion and the patent and the claims, and even the Supreme Court opinion, your Honor would note that the invention did not lie so much in putting just that circular steel jacket on the outside but that man did something. He took the upper edges of that steel jacket and turned them inwardly and embedded them into that ridge or tongue that we have on top of the battery, the end seals. He took the lower edge of that cylindrical body of steel and he crimped those up so that he not only resisted outward thrust and leakage, but he actually formed a seal, your Honor, between the upper end of the outside steel jacket and the end closure.

The Court: Was that the invention?

Mr. Miketta: Well, by golly, now, he had something that was new. Now, remember in that case the court deemed it to be invention because it was a

new result. It was not a result in degree and it was not simply just shooting something higher than it had gone before.

The Court: Let us examine that a minute and see if it was not a difference in degree. The old cardboard—I picked up one the other day in the store and looked at it—Ever-Ready, and it still makes the cardboard case, apparently never succumbed to the Ray-O-Vac invention. It may [16] have been an old battery, but I saw one in the store and I picked it up and examined it. That old cardboard case has a protective cover, it has a solution, it is waxed-treated, and apparently it resists to some extent the inroads of acid and corrosion of the acid. Now, isn't that the same result in kind, although it be a great difference in degree, that the Ray-O-Vac metal insulator accomplished?

Mr. Miketta: No. The Ray-O-Vac case shows a difference in kind, your Honor, because no matter how many layers of wax or paper you put just on the outside of your battery, when the zinc wall, inner zinc cylinder is corroded, you are going to get leakage at the ends.

The Court: Sure.

Mr. Miketta: But these people, the Ray-O-Vac people, crimped that steel end over and embedded it into the end enclosures and, as stated by the District Court, by crimping the steel jacket over the closures or making the bottom integral with the cylinder, expansion of the cells at the ends is prevented. And the claim, incidentally, in that case specifically called for sealing at the ends.

The Court: Is that an invention?

Mr. Miketta: Well, I am not going to argue with the Supreme Court on that case, your Honor.

The Court: Well, I am not either. I just want to apply the law correctly and I am trying to fit this case. I agree that every patent or every case has to stand on its own bottom. [17]

* * *

The Court: As I say, I am only worried about Ray-O-Vac. You see, Ray-O-Vac is a comparatively recent case.

Mr. Miketta: Yes. So is the Great A & P case.

The Court: Wrapping an article in a piece of metal and crimping both ends is not what I would think would be, at first blush, the so-called flash of genius that is required to constitute invention.

Mr. Miketta: Well, your Honor, at least the man did something different and did not substitute one shell for another. He at least crimped the ends. But what have these people done? They have not crimped any ends or produced any new and different result. [19]

* * *

The Court: What comment do you have to make, Mr. Miketta, on the long period of time that this problem had apparently existed without being solved?

Mr. Miketta: That, I think, is a lot of hokum for the simple reason—and that is indelicate language, your Honor—but frankly, this patent F-18 was involved in litigation before, and they made

some representations during the trial of that case that this patent F-18, now expired, was the answer to the maiden's prayer. I have never seen an inventor who did not make that contention.

The Court: You and I do not have much difficulty, do we, in perceiving that there was a need for these purposes, for this sort of a device, and after all, we wonder why it was not thought of before, don't we? Aren't you surprised in view of this state of the art that this type of flare was not produced many, many years ago? [23]

Mr. Miketta: I think it was produced, your Honor. The only reason that until the Coast Guard started actually setting forth specifications that a flare must go up to 150 feet to be useful, and caused all of the manufacturers to put in enough power so that it went up that high, and imposed a restriction on them that the candle power must be to a certain standard, there probably were manufacturers who had flares that went up as high, but perhaps they did not burn as brightly.

The Court: There isn't anything in the prior art to show that, is there? What I have in mind is this: The curvature of the earth has not changed.

Mr. Miketta: No.

The Court: So the need for a certain altitude to give a signal at sea has not changed.

Mr. Miketta: That is right.

The Court: And we have known the use of projectiles for many, many years and the means to project them. We have known the use of flares and even, I suppose, the parachute flares a good many

years. Doesn't it seem strange that this need was not met sometime long before it was?

Mr. Miketta: Your Honor, remember this: This F-18 definitely states that it is to be projected a sufficient distance from any station afloat, or ashore. Now, this old expired patent said that the projectile was to be projected [24] a sufficient distance from any station afloat, or ashore. The pistol——

The Court: To do what?

Mr. Miketta: Pardon?

The Court: In order to accomplish what?

Mr. Miketta: Well, this was a signaling, in order to signal properly, otherwise what function? The whole device is signaling.

The Court: It would not accomplish anything like the result that your client's flares, for example, accomplish today, would it?

Mr. Miketta: I don't know. Why shouldn't it if you put in the right flare composition into that F-18 device, and you put in a sufficiently large cartridge in the bottom, that thing will go up and it will open because it even includes a stick that will prevent the parachute from collapsing.

The Court: Oh, it will go up if it doesn't go to pieces.

Mr. Miketta: Oh, they sold a lot of these things, your Honor, and they were satisfactory. They actually made them.

The Court: Were they satisfactory for present day services?

Mr. Miketta: Well, we are not studying or we

are not judging the patent by government specifications.

The Court: Could they be projected to any such height?

Mr. Miketta: Yes, sir. [25]

The Court: They could be?

Mr. Miketta: Why certainly they would go up that high. Remember this little gimmick that is patent F-21, I think—no. Well, it is just almost a toy but it is supposed to go up 150 feet in the air. That is F-19.

The Court: You do not think the device taught by the patent in suit even produced a better result?

Mr. Miketta: Every inventor claims he has a better result, your Honor.

The Court: I am asking you what you think about it.

Mr. Miketta: No, because you can make a device and not put in the right flare composition and you certainly won't have a better result, your Honor. You may not have any result. You can take the patent in suit, build a device exactly like the specifications call for, and it will not burn for a length of time sufficient to be even worth while as a signal. And if you take the claims, your Honor, a lot of claims do not even say that you have to have a thick base and thin side walls. They do not teach you how to build a better flare. Of course, every patentee, every inventor claims that he has made an improvement.

The Court: Oh, yes.

Mr. Miketta: But this is not an inventive im-

provement. There is no invention in substituting a one-piece shell for a two-piece shell. [26]

The Court: I would not have any trouble holding with you if I could just get this Ray-O-Vac case disposed of in some way.

Mr. Miketta: There was more than substitution in that case, your Honor. You will grant me that they at least turned the outer edges, but here it is nothing but substitution.

The Court: The cardboard containers sometimes have bottoms on them, don't they?

Mr. Miketta: That is right, but they don't crimp into. You see, when you take that outer cylinder—I don't know what I would do if I did not have hands—but if your Honor imagines that this is the upper edge of the cylinder and this is the bottom edge of that outside cylinder, and you turn those edges in against the upper and lower seals, then you have a clamping action there. You not only prevent that liquid from going upwardly, but you also bring them together. Now, paper would not do that. You can roll the edge of the paper, and they do roll the edge of the paper, but that is only as a decorative feature, almost, to prevent fraying, but it does not clamp down into the end seals and seal the liquid, preventing it from end movement. There is a difference there, your [27] Honor.

* * *

Mr. Schmieding: With respect to F-18, your Honor, I call your attention to line 9 in column 1 of page 1, where the idea is to project a short

but sufficient distance from the airplane. As Dr. Clauser testified, that is what this particular shell was made for.

Now, also, on page 2, column 1, line 39, the sentence starting there:

“In the operation of the device, the initial velocity of the container B, after leaving the gun, will be comparatively small, * * *”

Now, that is true, as Mr. Miketta stated. You can place a powder in there to lift that projectile up to the desired height. But, can you hold it in your hand? And if it can be done, why does defendant not make the expired apparatus instead of copying exactly the patent in suit?

The Court: Isn't our question here probably this: Whether [29] the result produced was so far superior to the result produced by any other combination as to be in effect a new result?

Mr. Schmieding: That is right, your Honor. That is right. It is something that they have been striving for and never solved until these men conceived of this simple idea.

The Court: Anything further?

Mr. Miketta: I do not think it is necessary, your Honor.

The Court: I appreciate you gentlemen coming here again and giving me this assistance. I have before me the findings and judgment proposed by both sides. I will resubmit the matter and endeavor to decide it shortly.

[Endorsed]: Filed January 22, 1951. [30]

[Endorsed]: No. 12892. United States Court of Appeals for the Ninth Circuit. Signal Manufacturing Company and Charles Schneider, Appellants, vs. The Kilgore Manufacturing Company, a Corporation, Appellee. Supplemental Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed April 5, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

892
No. 12,982.

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

SIGNAL MANUFACTURING COMPANY, a corporation, and
CHARLES SCHNEIDER, d.b.a., SIGNAL MANUFACTURING
COMPANY,

Appellants,

vs.

THE KILGORE MANUFACTURING COMPANY, a corporation,
Appellee.

BRIEF FOR APPELLEE.

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Appellants,

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THE KILGORE MANUFACTURING COMPANY, a corporation,
Appellee.

BRIEF FOR APPELLEE.

Statement of Case, Controverting in Part Appellants' "Brief Statement of Case."

Except for the first two paragraphs in the first part of paragraph 3 of appellants' "Brief Statement of the Case," the remainder thereof is so interspersed with arguments, which are not supported by the record, that the facts are not discernible, even to the extent of accusing the Trial Court of being confused.

Prints of the patented distress signal, the commercially successful signal of appellee, and appellants' signal are appended hereto.

Appellants consistently tried to confuse the issue. The issue is *not* "Is it invention to substitute a one-piece con-

tainer for a two-piece container in an old combination?" What the evidence shows is that "a better result than anything previously known to the art," was produced by a new combination of elements, one of which was the one-piece projectile shell having relatively thin side walls and a thick base, in combination with other old elements, which effected the better result.

The structure of the patent in suit answered a long felt need for the saving of lives of occupants of life boats. *The problem was to project a flare and parachute from a life boat to such height that the flare could be seen from a distance of twenty-five miles or more.* The flare must burn at least long enough to attract attention. Thirty seconds was deemed the minimum burning time. The brilliancy must be such to attract attention in the day time as well as at night. A 20,000 candle power flare was deemed the minimum requirement. [F-29, p. G-10; R. 219.] Obviously then considerable flare material was necessary and the parachute had to be sufficiently large to permit slow descent of the flare. The equipment for projecting the flare and parachute included a hand-held pistol. When such hand-held pistol is used, the weight of the projectile, including the parachute and flare, must be limited, otherwise the recoil could not be withstood by the operator, due to the explosion of the powder to lift the projectile 150 feet or more.

Plaintiff-appellee always maintained, as held by the Court in the above quoted matter, that the patent in suit is directed to a combination of elements which produced a new, long sought result. The Trial Court so understood and was not confused [R. 337]:

"The Court: We get down to this patent in suit, and the plaintiff claims a combination of entirely

old elements in a way so as to produce a new result. Let's take it from the basis of the combination described in their claims 8, 10 and 11, which Mr. Schmieding mentioned this morning. Let me put it this way: *the combination appears to be useful and new as a combination in this field. . . .*" (Emphasis ours.)

The evidence shows as the Court stated in his decision [R. 149]:

" . . . It seems clear to me that the inventors have devised something new and useful in this relatively crowded but apparently a slowly developing field. They have produced *a new combination of old elements which together produce a better result than anything previously known to the art.*

"I find that the combination is not only new and useful, but it embodies invention. I am unable to distinguish this situation here from the Ray-O-Vac case in 321 US Reports." (Emphasis ours.)

Thereafter the Court, with respect to claims 10 and 11 on appeal stated [R. 149]:

" . . . I find the combinations there described are new and useful and embody invention, and that those claims are valid and infringed by the accused device here, Plaintiff's Exhibit 2."

The Trial Court, who heard the testimony, who examined the patent in suit, and the prior art, found no admissions by plaintiff-appellee that the invention lay

in making the bottom of the case or shell integral with the side walls or that the combination of elements was not new, but to the contrary found that these elements produce a better result.

Summary of Argument.

The Trial Court properly held, by a decision at the end of the trial, that claims 10 and 11 of the patent in suit were valid and infringed, and that said claims describe the combination and all essential elements of it with sufficient specificity. *Upon rehearing*, approximately two months later, *he again came to the same conclusions.*

Appellants' signal flare is a Chinese copy of the patent in suit and appellee's flare, the latter having proved commercially successful.

Claims 10 and 11 define a combination of old elements that produce a new and long sought result. Appellee has always maintained that position.

Appellants have tried consistently to confuse the issue by injecting a conjured doctrine that, at least one new element, of a new combination of elements that produces a new result, must be present. We have followed the old and subsisting doctrine that patentability is present in a combination of old elements which produce a new and long sought result, particularly when the product is commercially successful. We have cited decisions supporting this doctrine.

The Utility of Patented Structure.

Mr. Hubbard, Vice-President of Kilgore and who had charge of development, manufacture and sale of products sold by International Flare Signal Company, a division of Kilgore, testified that plaintiff manufactured a flare like Exhibit 5, starting in 1934. To the best of his recollection, no essential changes were made. He also stated that the plaintiff paid royalties to Driggs and Faber under Patent No. 1947834, the patent in suit [R. 91]. Hundreds of thousands of them were sold to the United States Coast Guard, ship operators and ship chandlers through the country [R. 92]. He testified to utility as follows [R. 255]:

“A. Well, prior to the time that this aerial signal was developed by us—

Q. ‘This aerial signal’ Exhibit 5? A. This Exhibit 5. The only thing that was a prescribed requirement for life boats, life rafts, was a hand signal, 2-minute hand signal that ignited from a scratcher cap. You would hold it in your hand; it would burn two minutes at whatever level the holder was. By reason of the fact that the natural curve of the earth would block out that signal, a visibility at a distance of three to five miles, its efficiency from the standpoint of being a signaling device was naturally very limited. After we had in collaboration with the Coast Guard developed different types of aerial signals and flares for their use, we thought that there might be a market for a signal of this type, Exhibit 5, commercially, for life boat and life raft use. Before we could do anything toward the commercial exploitation of the item however, it was necessary to receive the approval of the governing body, which at that time was the Bureau of Marine Inspection and

Navigation of the United States Department of Commerce, who controlled all items that went on to boats, life rafts, life boats, life preservers, anything that went on in the commercial steamship operations. Naturally the commercial steamship operators were not going to use anything that was not approved by the governing body, the Bureau of Marine Inspection and Navigation. In the first place they were not allowed to.

We had to prove to the Bureau of Marine Inspection and Navigation that our item possessed merit far above what they had already approved as equipment for life boats and life rafts. We were able to do so by reason of tests they put on in New York Harbor on several different occasions, out of Baltimore, where we had the Supervising Board for demonstrations, and I think we went on Coast Guard cutters and we proved visibility from 26 to 30 miles away as compared with the previous limited visibility of from three to five miles. I think that was about the figure. After which, and after much wrangling with them, they made a mandatory requirement that all boats and life rafts of ships under the American Registry should be equipped with an approved type of pistol and signal flare of this kind.

Q. 'This kind' is that Exhibit 5, you mean? A. Yes. There were certain functional characteristics prescribed at the time. I don't say that no other signal made differently wouldn't receive approval. In fact there were others received approval subsequent to our pioneering the market on the thing" [R. 257].

. . . .

"Q. A hand-type of signal which was lit in very much the same way that you'd light a Roman candle or a burning stick? A. No; it was a scratcher type. There was a cap on the end that by removing a strip

of cloth you exposed a scratcher on this cap that went over the end of the signal. By reversing that cap and scratching across the prime head of the signal, you could ignite it. You would hold it in the hand.

Q. Then it would burn like a torch? A. That is right" [R. 259]. . . .

"Q. But it would not eject any signal to any height? A. That is correct. There were signals manufactured at that time, prior to that time, that could be projected, but *not the parachute type of signal*. In World War I there was what they called the Very Pistol; you shoot a star in the air.

Q. You are familiar with the Very Pistol and the star shells? A. Star shells were not pistol operated.

Q. It is your contention that there were no parachute type flares prior to the invention allegedly made by Driggs and Faber in the patent in suit? A. No; I don't say that, but they had never been offered commercially. There were parachute signals made prior to that time of a sort.

Q. They were not in commercial use? A. That is correct" [R. 260]. (Emphasis ours.)

From this testimony it is evident that a signal flare, constructed as taught by the patent in suit [Ex. 5] was the first practical signal flare for life boats that could be shot from a hand-held pistol. There cannot be any question as to the utility of this device over the previous torch having a limited visibility of from 3 to 5 miles.

Exhibit 5 was known as a "No. 52 signal" [R. 91]. Mr. Hatch, sales manager of International Flare Signal Division of Kilgore, read a list of names of companies taken from Kilgore's shipping record, showing to whom

No. 52 flares had been shipped during 1944, 1945 and 1946 [R. 269-272]. He testified that approximately seventy-two thousand (72,000) flares were sold in 1944 and 1945 and approximately two thousand were sold in 1946 [R. 104].

The unrefuted testimony of Dr. Clauser, who is an expert and was an expert in explosive and pyrotechnics during and since World War I [R. 287], shows that the *instant patented structure solved a problem that puzzled the industry including Dr. Clauser, for decades*. Dr. Clauser testified [R. 115]:

“Q. (By Mr. Schmieding): Dr. Clauser, could you tell us the advantages, if any, of a projectile made of a one piece of drawn metal such as that shown in the patent?

* * * * *

A. That is one of the things that has puzzled the other fellow for a number of years. That included myself. . . . It is that part of the flare which is projected into the air at 150 feet or more, and it is projected with powder. . . . That one piece there, it is definitely the most fool-proof mechanical structure that we know of at this time, . . . If that spit (fire) of that expelling charge (in the cartridge case) gets by the delay (fuse) or by the base, if it is a two-piece projectile, it will be premature (meaning premature ignition of the expelling charge in the projectile shell) and the whole business will explode right over your head and fall back on your body or in the boat and you have no signal. That is, it is exceedingly difficult to handle that, and, as a one-piece construction, over my years of experience I find definitely that, regardless, to be the very best construction for that purpose.”

Dr. Clauser asserted the value of a projectile shell having a *thin side wall* and an integral *base of thicker material*, i. e., a light weight projectile shell that withstands the force of the explosion of the propelling charge in the cartridge case and the explosion of the expelling charge in the projectile shell.

In this connection Dr. Clauser testified as follows [R. 117, R. 294]:

“Q. Has that integral projectile any advantage with respect to the black powder 6? And that also explodes, does it not, to eject the candle and the parachute? A. Oh, yes.

Q. Does that integral structure have any advantage in that respect? A. Oh, definitely.

Q. Will you explain that to the court, please?” [R. 117].

A. I have already pointed out that because of its construction, that is, the projectile being lodged into that there cartridge case, wedged in there, and just as soon as that priming cap, igniting cap . . . more correctly called a percussion cap—functions, the powder explodes, and the moment of its explosion or what we call the initial impulse is terrific until something occurs, until more space, until you get more volume, until you get the equivalent of a chamber in there. So because of that terrific pressure, it is directly under that delay, properly called a fuse, that takes a beating there and unless that is properly located there and properly anchored, why, that terrific pressure can blow right through the delay and cause a premature that way by blowing the delay right into the powder of the explosion charge.

The Court: What ignites the black powder in the projectile?

The Witness: In the projectile the black powder, the delay, sir.

The Court: With a fuse, the black powder?

The Witness: Yes, a fuse or delay—”

Dr. Clauser gave further testimony as to the value of the one-piece projectile shell over the two-piece type as follows [R. 138, R. 309]:

“Q. (By Mr. Miketta): Irrespective of what material we are using, Dr. Clauser, if we had a projectile shell in the form of a metallic tube, and you attached a separate bottom on that tube, either by screwing it on or welding it on, as long as you made sure that you had a tight joint between that bottom and the walls of that projectile shell, wouldn't that answer the requirements and prevent flash? A. It would as long as you get it to the point where you get it absolutely tight. [R. 309.] *But that is the fly in the ointment.* It is so difficult to do. That is where you get into trouble. When you put another piece on there, you must screw it in, as you say, have thread on there, and it is a fact that that is done with difficulty. If you want to use a glue or an adhesive, why, that over a period of time will dry, and as it dries it contracts. If you use tar and put it on there, these signals are thrown into the holds of a ship, or one side of an engine in a plane, and they are stored in hot climates and your tar will melt. It just does not take the place of that bottom there which comes as a result of that one piece of construction. I have stubbed my toes on that all my life.”

And in [R. 312], Dr. Clauser testified as follows:

“Q. If you use screw threads, Doctor, or if you would weld a base to the projectile, would that in-

crease the weight of the projectile shell? A. It will increase the weight, yes, sir.

Q. Why would it increase the weight of the projectile? A. Because of the fact that you must have material, you must have stock at the bottom there that has more surface on the sides so as to get your threads on there, and if you get more stock on there it would increase the weight." (Emphasis ours.)

Further with respect as to what was done commercially before the advent of the present invention, may be summed up as follows [R. 301]:

"Q. By Mr. Miketta: But is it not a fact and do not the publications actually show, Dr. Clauser, that parachute type flares were shot from the Very and Webley-Scott pistols to heights of 200 to 400 feet? A. A Very star parachutes?

Q. I am talking about parachute types. A. No, sir. I have never come across that, not with a parachute, no, sir.

Q. Do you doubt that they were shot that high? A. If they were shot, I would be surprised if you would also tell me that many of them did not work very well, *because that was the headache. That is why we were called upon for something to take its place. That was all the trouble of the Army. It was then Army Materiel, and I recall after World War I there was a million dollars worth of that materiel that was dumped into the Atlantic Ocean because of its failure to function.*" (Emphasis ours.)

The signal shell there employed in the Very and Webley-Scott pistols used a two-piece projectile shell as shown in Exhibit F-27.

Thus the instant patent discloses the first fool-proof signal flare for life boats. *The prior two-piece shells were, of necessity, heavier and required more propelling charge in the cartridge cases to lift them to the desired height, which, of necessity, took such signals out of the class of those that could be fired from a hand-held pistol because of the terrific recoil of the explosion of the propelling charge.* This invention then “produced a new combination of old elements which together produce a better result than anything previously known to the art”.

A Patent Is Presumed to Be Valid by Reason of Its Grant by the Patent Office and the Defendant Has a Heavy Burden of Proof to Show Invalidity for Lack of Invention.

In the case of *Williams Mfg. Co. v. United Shoe Mach. Corp.*, 121 F. 2d 273, (C. C. A. 6, June 27, 1941) (affirmed 316 U. S. 364), the Court of Appeals at 277 stated:

“The appellant urges the first McFeely patent as complete anticipation of the claims of the patent in suit. It is without doubt its most pertinent reference. But the first McFeely patent was before the Patent Office for consideration on the second application and there is no indication that McFeely experienced unusual difficulties in the pursuit of the patent in issue. We are, therefore, obliged to give consideration to the rule that ‘one otherwise as infringer who assails the validity of a patent fair upon its face bears a heavy burden of persuasion, and fails unless his evidence has more than a dubious preponderance. Cf., *Philippine Sugar E. D. Co. v. Philippine Islands*, 247 U. S. 385, 391, 38 S. Ct. 513, 62 L. Ed. 1177.’ *Radio Corporation v. Radio Laboratories*, 293

U. S. 1, 8, 55 S. Ct. 928, 931, 79 L. Ed. 163. To the presumption of validity that attaches to a granted patent, where the most pertinent prior art has been cited against it in the patent office, there must probably now be added the force of a growing recognition of finality that is generally being accorded to administrative determinations supported by evidence, on the ground that the administrative agency is expected to have developed an expertness in its specific field beyond what may be expected from the courts wherein adjudications range the whole field of human controversies. It is true, of course, that in the most strict sense, the granting of a patent is not, except when an interference is declared, the result of an adversary proceeding, as in usual administrative determinations of agencies exercising quasi-judicial functions. Nevertheless, it wears, in the broader sense, an adversary aspect, since patent office examination protects the public against unmerited monopoly, and so the public, as represented by the examiner is always impliedly in adversary position to the application just as it is ever a third party to an infringement suit.”

In *Ralph N. Brodie Co., et al. v. Hydraulic Press Mfg. Co.*, 151 F. 2d 91 (C. C. A. 9., Aug. 29, 1945), Your Honors held at 94:

“Both patents were regularly issued. Hence both patents and all claims thereof were presumptively valid. Hence the burden of establishing the invalidity of claims 7, 9, 10, 11, 14 and 15 of patent No. 2,067,265 and claims 7, 8, 9 and 10 of patent No. 2,136,240 rested on appellants.

“All these claims were for combinations. Appellants alleged, in substance and effect, that these combinations were not new, and that therefore the claims

were invalid for lack of novelty. The question thus presented was one of fact. On this question, appellants had the burden of proof.

“Appellants alleged, in substance and effect, that the combinations did not involve invention, but were merely the product of ordinary skill, and that therefore the claims were invalid for lack of invention. The question thus presented was one of fact. On this question, appellants had the burden of proof.

“On both questions—the question of novelty and the question of invention—the evidence was conflicting. Resolving the conflicts in favor of appellee, the court found that the combinations were new, that they involved invention, and that therefore the claims were not invalid for lack of novelty or for lack of invention. These findings are supported by substantial evidence, are not clearly erroneous and should not be set aside.”

Where Patentee Solves a Problem Which Has Long Faced an Art, It Is Evidence of Invention.

In *Goodyear Tire & Rubber Co., Inc., et al. v. Ray-O-Vac Co.*, 321 U. S. 275, 64 S. Ct. 593, the Supreme Court on February 28, 1944 at 594 stated:

“Viewed after the event, the means Anthony adopted seem simple and such as should have been obvious to those who worked in the field, but this is not enough to negative invention. During a period of half a century, in which the use of flash light batteries increased enormously, and the manufacturers of flash light cells were conscious of the defects in them, no one devised a method of curing such defects. Once the method was discovered it commended itself to the public as evidenced by marked

commercial success. These factors were entitled to weight in determining whether the improvement amounted to invention and should, in a close case, tip the scales in favor of patentability. Accepting, as we do, the findings below, we hold the patent valid and infringed."

In *Webster Loom Co. v. Elias S. Higgins*, 105 U. S. 580, Justice Bradley speaking for the Supreme Court stated at 599:

"At this point we are constrained to say that we cannot yield our assent to the argument, that the combination of the different parts or elements for attaining the objects in view was so obvious as to merit no title of invention. Now that it has succeeded, it may seem very plain to anyone, that he could have done as well. This is often the case of inventions of the greatest merit. It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produce a new and beneficial result, never attained before it is evidence of invention."

In the case of *Diamond Rubber Co. of New York v. Consolidated Rubber Co.*, 220 U. S. 428, Justice McKenna speaking for the Supreme Court at 444 stated:

"Many things, and the patent law abounds in illustrations, seem obvious after they have been done, and, in the light of the accomplished result, it is often a matter of wonder how they so long eluded the search of the discoverer and set at defiance the speculations of the inventive genius. Knowledge after the event is always easy, and problems once solved present no difficulties, indeed, may be repre-

sented as never having had any, and expert witnesses may be brought forward to show that the new thing which seemed to have eluded the search of the world was always ready at hand and easy to be seen by a merely skillful attention. But the law has other tests of the invention other than subtle conjunctures of what might have been seen and yet was not. It regards a change as evidence of novelty, the acceptance and utility of change as a further evidence, even as demonstration."

From the above quoted testimony of Dr. Clauser and Mr. Hubbard, it is evident that the demand for a hand-held, pistol projected, fool-proof signal flare, preceded by years the invention taught in the instant application. The demand for a signal flare, which could be visible from great distance, existed since pyrotechnics were known. *Prior to the advent of the present invention, the lives of shipwrecked people depended on whether or not a rescue ship was within a few miles of the life boat,* since prior to the advent of the present invention the distress signal consisted of a hand-held torch. By the universal adoption of the invention of the patent in suit, the chances of finding the lifeboat, in the large open sea, were multifoldedly increased. The inventive thought of using a one-piece projectile shell, in combination with the other elements, turned the former failures into success.

The Supreme Court in *The Barbed Wire Patent* case, 143 U. S. 275, 282, 36 L. Ed. 154, 158, said:

"Under such circumstances courts have not been reluctant to sustain a patent to the man who has taken the final step which has turned a failure into a success. *In the law of patents it is the last step*

that wins. It may be strange that, considering the important results obtained by Kelly in his patent, it did not occur to him to substitute a coiled wire in place of the diamond shape prong, but evidently it did not; and to the man to whom it did ought not to be denied the quality of inventor. There are many instances in the reported decisions of this court where a monopoly has been sustained in favor of the last of a series of inventors, all of whom were groping to attain a certain result, which only the last one of the number seemed able to grasp. * * * It may be laid down as a general rule, though perhaps not an invariable one, that *if a new combination and arrangement of known elements produce a new and beneficial result, never attained before, it is evidence of invention.*" (Emphasis ours.)

We have always maintained that the inventors reconstructed a new combination which produced a new and beneficial result, never attained before. The substitution of a one-piece projectile shell, that is, a projectile shell in which the relatively thin side walls and the relatively thick base, being formed of one piece of metal, reduced to the very minimum any possibility of pre-ignition of that powder charge therein which is later used to eject the flare and the parachute from the shell, after the projectile reaches the zenith of its flight. The last step that changed the old unsuccessful distress signal to a successful one. As stated in *The Barbed Wire Patent* case (*supra*), "In the law of patents it is the last step that wins".

This doctrine of "In the law of patents it is the last step that wins" has been consistently followed by this court. One of the recent decisions by this court on this point is *Pointer d. b. a. Pointer Willamette Co. v. Six*

Wheel Corporation, Case No. 12,146, decided September 27, 1949, 177 F. 2d 153 (C. C. A. 9), in which Your Honors stated:

“A test which has been found very useful and generally followed is that adverted to by Mr. Chief Justice Taft in the case just referred, . . . namely, the discovery of the source of the difficulty and the application of a remedy not thought of before.”

Citing decisions among which is *Johnson Co. v. Philad Co.* (1938) (C. C. A. 9), 96 F. 2d 442, 444, your Honors went on to say:

“By the same token, *invention cannot be defeated merely by showing that, in one form or another, each element was known or used before.* . . . (citing decisions). (Emphasis ours.)

“The question is: Did anyone before think of combining them in this manner in order to achieve the particular unitary result, . . . a new function? *If not, there is invention.* . . .” (Citing decisions.) (Emphasis ours.)

The art, except other patents of Driggs and Faber, introduced by appellant in the instant case was “paper” art. As stated in the *Pointer v. Six Wheel Corporation* case (*Supra*):

“The art, it should be observed, is chiefly ‘paper’ art. No structure constructed according to the teachings of any of the claimed prior art was introduced in evidence. . . .

“. . . and the inferences which the judge was free to draw from this testimony, as it related to entire problem, he was warranted in concluding that the Knox patent was invention over the prior art, was a deviation from it which achieved a new result.”

This Court then cited the language of Judge Learned Hand in the case of *Safety Car Heating & Lighting Co. v. General Electric Co.* (1946) (C. C. A. 2), 155 F. 2d 937, 939:

“Courts made up by laymen as they must be, are likely to either underrate, or to overrate, the difficulties in making new and profitable discoveries in fields with which they cannot be familiar; and, so far as it is available, they had best appraise the originality involved by the circumstances which preceded, attended and succeeded the appearance of the invention. Among these will figure the length of time the art, though needing the invention, went without it: the number of those who sought to meet the need, and the period over which their efforts were spread; how many, if any, come upon it at about the same time, whether before or after; and—perhaps most important of all—the extent to which it superseded what had gone before.”

In the decision of this Court *The Johnson Co., Inc. v. Philad Co., et al.* (*supra*), this Ninth Circuit Court states:

“The evidence shows that the Mayer process solved the problem confronting hair dressers by providing a practical method of applying a permanent Croquignole wave to the human head. As we have said, the essence of the invention was applying clamps to the hair before winding. Although this step was simple, it apparently was not obvious to those skilled in the art of hair dressing and the introduction of the patented method met with immediate and substantial commercial success. Solving such a problem in a practical manner constitutes invention. See *The Craftint Mfg. Co. v. Baker*,

No. 8371, decided by this court January 10, 1938, 94 F. 2d 369 (36 U. S. P. Q. 164); General Electric Co. v. Wabash Appliance Corp. (C. C. A. 2), 93 F. 2d 671 (36 U. S. P. Q. 214)."

The Trial Court found [R. 67]:

"9. The inventors of patent No. 1,947,834 in suit devised something new and useful. They produced a new combination of old elements which together produced a better result than anything previously known to the art.

"10. The subject matter of the patent in suit is in a crowded field. It answered a long-existing need which had not been answered by the prior art, and met with commercial success.

"11. Prior to the advent of the invention in suit, no one had devised a metallic projectile shell which would meet the need of lift to an effective elevation, carrying a flare of high candle power which would burn for a relatively long period of time, and be reasonably certain to function at the approximate zenith of its upward flight without premature ignition of the expelling charge therein.

"12. Signal parachute flares made in accordance with the teachings of the patent in suit were the first successful distress signals that could be fired from a hand-held pistol and could be seen from a distance of twenty-five to thirty miles when shot by an occupant of a lifeboat.

"13. The patentees were the original and first inventors of invention of the patent in suit, as defined by claims 10 and 11 here in issue. The invention defined by claims 10 and 11 is directed to a combination that is not only new and useful, but embodies invention and constitutes patentable subject matter."

Appellants paid tribute to the patent in suit by making a Chinese copy of the patented structure.

Appellants' arguments are no answer to the facts found by the Trial Court.

In the case of *Ralph N. Brodie Co. et al. v. Hydraulic Press Mfg. Co. (supra)*, Your Honors held:

"On both questions—the question of novelty and the question of invention—the evidence was conflicting. Resolving the conflicts in favor of appellee, the Court found that the combinations were new, that they involved invention, and therefore the claims were not invalid for lack of novelty or for lack of invention. These findings are supported by substantial evidence, are not clearly erroneous and should not be set aside."

Attention is directed to a decision of this Court in *Payne Furnace and Supply Co., Inc. v. Williams-Wallace Co.*, 117 F. 2d 823 (C. C. A. 9), wherein the invention under consideration comprised a flue pipe including an outer tube with insulation around the inside surface of the tube and an inner tube slidably located inside the insulating material. Telescoping pipes were old in the art and the use of insulation between pipes was also disclosed in the prior art cited. The Court there stated:

"The flue pipe is old, yet has its problems; and it would seem that Stadtfeld's combination has overcome a number of important difficulties in this field. His pipe, as the Trial Court found, has gone into wide and successful use in the building industry. Appellant, with Stadtfeld's work before it, has manufactured and put on the market an exact copy, . . ."

Appellant in that case endeavored to excuse its infringement in citing prior art which showed each of the elements to be old. The Court went on to say:

“Stadtfeld’s improvement occurred within the confines of an ancient art. Its immediate and wide commercial adoption is powerful evidence of invention as contrasted with the exercise of mere mechanical ingenuity. Compare *Paramount Publix Corporation v. American Tri-Ergon Corporation*, 294 U. S. 464, 474 (24 U. S. P. Q. 303, 307). The patent is entitled to the presumption of validity; and the citations to the prior art fail to overcome the presumption.”

In the case of *Goodyear Tire and Rubber Co. Inc., et al. v. Ray-O-Vac Co.*, 321 U. S. 275, the Supreme Court had before it, the question of whether invention was involved in encasing the well known flashlight dry cell in a well known metallic shell. From the decision of the Trial Court in *Ray-O-Vac Company v. Goodyear Tire and Rubber Company et al.*, 45 Fed. Supp. 927, it will be seen that all of the elements of the combinations claimed in the patent under consideration, were old in the same art including the metallic casing for the dry cell. All that the patentee did in that case was to crimp the upper and lower edges of the cylindrical sheet against the top and bottom of the conventional flashlight dry cell so as to prevent leakage of the electrolyte from the dry cell. Crimping to prevent leaks obviously was old.

No one prior to appellee utilized a one-piece shell for containing a parachute flare type distress signal, and as stated by the Trial Court in the *Ray-O-Vac v. Goodyear* case:

“This was his idea, a new and useful one satisfying a long felt want, followed by commercial success, a striking example of which is the acceptance of plaintiff’s battery in competitive bidding by the United States Signal Corps, where long life of the battery in the field is highly desirable. *Was this merely perfection of workmanship or was it to that impalpable intangible quality constituting invention?* While not all improvement is invention, yet every immediate step in advance which rises to the dignity of creation is entitled to protection and it may result from long careful consideration as well as from a flash of thought. *Does it spring from that intuitive faculty of the mind put forth for new results, yielding what had not before existed or bringing to life what had previously lay hidden from vision?* *Hollister v. Benedict Mfg. Co.*, 113 U. S. 59, line 72. Or, if not the product of the intuitive faculty of the mind resulting from a single brilliant event, does it arise from an inventive faculty which has thoughtfully conserved and correlated the causes and effects of movements and mechanisms which enter into a desired result? Obviously, the ideal line which separates invention from things otherwise produced can never be concisely or specifically defined. Every patent must be considered on its own merits. We must not grant to a single party a monopoly for every slight advance in the art. We must attribute invention only to such achievements as contribute substantial discoveries making novel and useful steps in advance in useful art. *If a particular result has been long desired and frequently sought but*

never attained, ordinarily we may not attribute lack of invention to the device which first achieved the desired result, because it seems that the simplicity of the means is so marked that many believe that they could readily have produced it if required. Barbed Wire Patent, 143 U. S. 275, 284. Though the device be simple, and it may seem strange that earlier makers should have failed to take the final step needed to convert their experiments into assured success, the simplicity will not preclude invention. Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403; LOOM Co. v. Higgins, 105 U. S. 580; Diamond Rubber Co. v. Consolidated Rubber Tire Co., 220 U. S. 428.” (Emphasis ours.)

This logical statement of a simple invention was affirmed by the Court of Appeals and by the Supreme Court of the United States. The language employed by the Trial Court and the United States Supreme Court is applicable *in toto* in the instant case. *Obviously, it is far more important for the development of a distress signal which was long needed for the saving of lives than the development of a dry cell for an inexpensive flashlight.*

Whether metal sheaths for dry cells are old or new or whether one-piece projectiles are old or new is immaterial. Like in the *Ray-O-Vac* case the patentees in the instant case, are not claiming a new element *per se* but are claiming a one-piece projectile in combination with other elements which go to make up the first successful parachute type distress signal for life boats.

With Respect to the Prior Art.

Appellants' Exhibit F-XIV was before the Patent Office and considered by the Patent Office as being non-anticipatory to the invention defined in claims 10 and 11 of the patent in suit. Attention is directed to the fact that this patent does not include a parachute and means to prevent the collapsing of the parachute; it is not a distress signal; it is merely "paper" art (*Pointer v. Six Wheel Corp.*). No structure, constructed according to the teachings of Exhibit F-XIV, was introduced in evidence; it was not such a structure that could be projected a substantial distance in the air. The patentee [Ex. F-XIV] states on page 1, column 2, line 96 "The propelling charge itself is *sufficient only* to expel the shell from the discharger and forces the cap off the shell, . . ." It is used in connection with an aircraft (p. 1, column 2, line 92) and is dropped from the aircraft. The propelling charge in the projectile shell is ignited "when the shell has *fallen* an appreciable distance" (p. 2, column 1, line 34). (Emphasis ours.)

Exhibit F-XVIII is not a one-piece projectile shell. Dr. Clauser testified as follows [R. 327-R. 141]:

"Dr. Clauser, I call your attention to Defendants' Exhibit F-18, which is the Driggs, *et al.* patent, No. 1,776,755. Does that patent disclose a one-piece projectile shell having an integral base and side walls?
A. That does not. That is not a one-piece shell. That is not a one-piece projectile case. There is a stem to that, it is a larger flare and there is a stem at the bottom of about two inches with reduced size.

The Court: Is that stem an integral part of the walls of the case or the base?

The Witness: It is not. That cannot be drawn as such, as it is here, today. That cannot be drawn, and it is a two-piece structure and it is connected, that stem is connected, Your Honor, that is, structurally connected, mechanically connected, to that projectile case, and that larger bore extension. A construction like that, if I am repeating I apologize, cannot be drawn successfully today out of aluminum.

Q. By Mr. Schmieding: Did Kilgore Manufacturing Company ever manufacture a flare such as depicted by Plaintiff's Exhibit F-18? That is Driggs patent No. 1,776,755. A. Yes. I want to add this for the Court's pleasure: It is an aerial shell, this is not a shell that is intended to be shot from the ground into space, like Mr. Miketta says, it can be shot up in the air. It is just the reverse. It is shot down. It is shot out from a plane. This is an aerial signal. It can be shot from the ground, but is not intended for that. We have to answer the question specifically. The United States Army, in the Aviation of the United States Army that is one of the shells that they buy, and we have manufactured them for them for years, and during the war, and I should like to point out that the purpose of this shell is for reconnoitering purposes, it is for landing before they liberate the big flare. This flare here, Your Honor, will burn for a whole minute. It has a terrific light intensity, and approaches 100,000 candlepower. It is to use primarily for the scouting planes to locate a terrain on which it will be possible to land, and then they put out larger flares.

The Court: Is this projectile case made of cardboard, fibre of some kind?

The Witness: The flare case is made out of cardboard, the projectile case is made out of aluminum, sir.

Q. By Mr. Schmieding: At any time did Kilgore manufacture that particular flare to which you are testifying out of one piece of drawn aluminum? A. No, sir. They are connected. The cartridge case at the bottom is one piece, which corresponds to the cartridge case in the other items, but this is definitely two-piece construction, the projectile case.

Q. Dr. Clauser, I wish to call your attention—

The Witness: Pardon me. In the patent—

The Court: Which patent?

The Witness: Patent 1,776,755, Driggs, Jr., *et al.*

The Court: Exhibit F-18 here.

The Witness: I don't have the exhibit number on mine.

The Court: Very well. What were you about to say?

The Witness: I want to point attention, in support of my statement, to paragraph 3, where it refers to 'this container B has reduced hollow stem b'—

The Court: That is in the second column, beginning at line 62?

The Witness: Beginning line 62. As you will read, you will find when you get to 65 it says, 'Connected to the stem b by the annular shoulder * * *.' It says 'connected'."

The structure shown in Exhibit XVIII was never intended as a parachute type of distress signal which could be shot into the air a substantial distance, and in confirming Dr. Clauser's descriptions of the device and the functions thereof, attention is directed to page 2 of that patent, column 1, line 39 in which it is stated "In the operation of the device, the initial velocity of the container B (projectile shell), after leaving the gun, will be comparatively small, * * *."

Dr. Clauser testified on cross examination as follows [R. 311]:

"Q. Dr. Clauser, prior to 1929 you have seen metallic shells made—I am just talking about metallic tubular shells—made of one piece of metal where the bottom and the side walls were all one piece of metal, have you not? A. Not unless you are talking about cartridge cases. Only in cartridge cases."

And in [R. 302]:

"Q. By Mr. Miketta: Is it not a fact, Dr. Clauser, that back in 1929 people had described the use of a one-piece projectile shell or case, and I am not talking about the patent in suit? A. It refers to one-piece cartridge cases, but I have never run across any of the literature where it has referred to other—you say don't it refer—I have never come across any literature or in my experience where a one-piece projectile case was used at that time, not of that diameter, 37 millimeter."

Law Relating to the Inventions in Which New or Better Results are Obtained by an Integral or One-Piece Shell.

While the claims under consideration in the instant case are drawn to a combination of elements, appellants stress the point throughout their brief that there is no invention in substituting a one-piece element for a two-piece element, citing certain decisions, in each of which the function of the machine or apparatus is *not* changed by the substitution of a one-piece element for a two-piece element.

The law that applies in the instant case is found in the following, wherein, like here, a new result is achieved:

In the case of *Canda v. Michigan Iron Co.*, 124 Fed. 486 (C. C. A. 6), the validity of claim 1 was questioned. That claim read as follows:

“(1) In a drawbar attachment for railroad cars, a spring casing formed integrally with a single casting having a closed top and an open bottom and constructed for attachment to the longitudinal draft timbers, substantially as herein shown and described.

* * * While it is true that there is no invention in making into one whole that which was before in the same form, but in detachable parts, when there is no further consequence, *yet it is also true that, if such change produces a more useful result, there may be a quality of invention in making it.*” (Emphasis ours.)

Canda v. Michigan Iron Co. (*supra*) was followed in *In re Otto et al.*, 121 F. 2d 553, and in *Application of Hubbell*, 164 F. 2d 700. These two cases cite also *Krementz v. S. Cottle Co.*, 148 U. S. 556 at 559, 13

S. Ct. 719 at 720, 37 L. Ed. 558, wherein the Supreme Court stated:

“In the present instance, however, we find a new and useful article, with obvious advantages over previous structures of the kind. A button formed from a single sheet of metal, free from sutures, of a convenient shape, and uniting strength with lightness, would seem to come fairly within the meaning of the patent laws.”

In the *Otto* and *Hubbell* cases (*supra*), the claims in issue were each drawn to a combination of old elements which produce a better result through the employment of an integral element which formerly was made of a plurality of parts. In the *Otto* case, the claim in issue was drawn to a combination of elements which provided an adjustable multiple groove sheave in which discs were bound into a unit. In the *Hubbell* case, the claim was drawn to a furnace including in combination, an outer shell, a base and a one-piece lining member.

The Court in the *Hubbell* case cited *In re Both*, 46 F. 2d 362, wherein the claim then in issue was directed to the combination of an electrical outlet box, an electric device, electric contacts. The sole novelty lay in the face plate including rearwardly extending walls molded in one piece. The Court there stated, page 364:

“* * * None of the references cited by either Examiner or the Board of Appeals seems to incorporate the idea which the applicant has suggested, namely, a device consisting of one part completely insulated, to be used as an electric outlet receptacle. There is much merit in his contention that such a device will be safe, economical, and easy to install. It may be claimed that the McBean reference, inas-

much as it shows a *cementing* of various parts, teaches the art of making a receptacle of one piece, and that applicant's idea is rather that of a process than a device. We are of the opinion, however, that there may be, and probably is, a clear distinction between a device made of one or more parts *cemented* together, and *one which is made as a whole*.

* * * Certainly, no one else, so far as the references disclose, has suggested this idea. * * *

(Emphasis ours.)

Appellants are free to use a two-piece projectile shell since there is no requirement in the General Rules and Regulations for Vessel Inspection [R. 219] or the Coast Guard specification [Ex. 4] that requires that the projectile shell be made of a single piece of metal.

Appellants Infringe.

Appellants do not deny that they employ the combination of (1) a cartridge case having (2) a base, (3) a propelling charge chamber and (4) a fuse mounted therein, said base carrying (5) side walls, (6) a telescopically-arranged shell mounted therein having a relatively heavy integral (7) base and (8) thin side walls, (9) a fuse in the base of said shell communicating with the propelling charge of the cartridge case on one side and with (10) an expelling charge in the shell on the other side, (11) a flare and (12) parachute in said shell, and (13) means to prevent the collapse of said parachute, all as defined in claim 10, and, with the addition as defined in claim 11 and (14) detachable closure means for said shell. Appellants contend that they do not infringe these two claims because they do not employ an annular groove in the base, for holding the cartridge case in the

pistol, but instead use an annular shoulder exactly like that shown in 27a of Fig. 2 of the patent in suit. The shoulder 27a performs exactly the same function as the shoulder formed by the annular groove 28, namely for the purpose of holding the flare within a pistol. The shoulder 27a abuts the rear end of the barrel, as shown in Fig. 10 of the patent in suit, and in the muzzle-loading type of gun, the cartridge case is held in position by a spring pressed nose 30 (Fig. 9) which abuts the shoulders formed by the annular groove 28. Whether the shoulder, as defined by groove 28, for retaining the cartridge case in the barrel of the gun extends inwardly or whether it extends outwardly as at 27a depends entirely upon the gun in which it is to be used. Exhibits F-III, F-IV, F-V, F-VI, F-VII, F-VIII, F-XIV, F-XXI, F-XXII, F-XXIII show breech-loading type of cartridges, and F-XV and F-XVI show muzzle-loading type of cartridges.

Dr. Clauser testified as follows [R. 300]:

“Q. By Mr. Schmieding: Dr. Clauser, will you please refer to the patent again, the patent? Fig. 2 shows a radial flange 27a on the base of the cartridge case and Fig. 4 shows a cartridge case in which there is an annular groove. Do you see that? A. Yes, sir.

Q. Do you know whether or not this is interchangeable practice in the ammunition field, guns?
A. It is, yes, sir.”

The only reason that the appellants and appellee used the outwardly extending shoulder instead of the inwardly extending shoulder, is to meet the government's specification Exhibit F-XXIX, wherein the signal must fit the marine signal pistol, specifications of the latter being

shown in Fig. 1 on page (G-10), the recess for the shoulder being shown by the indicia and arrows 1.665 plus or minus .001. Had the government specified the muzzle-loading type of gun, appellants and appellee would have provided signal shells with an annular groove in the base.

Equivalency.

The Trial Court held that the flange, like the flange 27a of the drawings of the patent, was the mechanical equivalent of the annular groove. In the opening statement, the Trial Court's attention was called to the recent decision of the Supreme Court of *Graver Tank & Mfg. Co. Inc., et al. v. Linde Air Prod. Co.*, 339 U. S. 605, 94 L. Ed. 1097, and the Court stated: "Yes, I am familiar with that decision" [R. 252]. In the dissenting opinion of Justice Douglas he pointed out that "The claims of the patent are limited to a flux 'containing a major proportion of alkaline earth metal silicate.'" He also pointed out that "Manganese silicate, the flux which is held to infringe, is not an alkaline earth metal silicate." He further pointed out that the manganese silicate "was disclosed in the application and then excluded from the claims". In the instant case both forms of shoulders are shown in the drawings and described in the specification. In the *Graver v. Linde* case, the patentee claimed a combination alkaline earth metal. The defendant did not use an alkaline earth metal. The majority Court went on to say "The question which thus emerges is whether the substitution of the manganese which is not an alkaline earth metal for the magnesium which is, under the circumstances of this case, and in view of the technology and the prior art, is a change of such substance as

to make the doctrine of equivalents inapplicable; or conversely, whether under the circumstances the change was so insubstantial that the trial court's invocation of the doctrine of equivalents was justified."

The following quotation from that case is applicable in the instant case:

"But the courts have also recognized that to permit imitation of a patented invention which does not copy every literal detail would be to convert the protection of the patent grant into a hollow and useless thing. Such a limitation would leave room for—indeed encourage—the unscrupulous copyist to make unimportant and insubstantial changes and substitutions in the patent which, though adding nothing, would be enough to take the copied matter outside the claim, and hence outside the reach of law. One who seeks to pirate a copyrighted book or play, may be expected to introduce minor variations to conceal and shelter the piracy. Outright and forthright duplication is a dull and very rare type of infringement. To prohibit no other would place the inventor at the mercy of verbalism and would be subordinating substance to form. It would deprive him of the benefit of his invention and would foster concealment rather than disclosure of inventions, which is one of the primary purposes of the patent system.

"The doctrine of equivalents evolved in response to this experience. The essence of the doctrine is that one may not practice a fraud on a patent. Originating almost a century ago in the case of *Winans v. Denmead* (U. S.), 15 How. 330, 14 L. Ed. 717, it has been consistently applied by this Court and the lower federal courts, and continues today ready and available for utilization when the proper cir-

cumstances for its application arise. 'To temper unsparing logic and prevent an infringer from stealing the benefit of the invention' a patentee may invoke this doctrine to proceed against the producer of a device 'if it performs substantially the same function in substantially the same way to obtain the same result.' *Sanitary Refrigerator Co. v. Winters*, 280 U. S. 30, 42, 74 L. Ed. 147, 156, 50 S. Ct. 9. *The theory on which it is founded is that 'if two devices do the same work in substantially the same way, and accomplish substantially the same result, they are the same, even though they differ in name, form, or shape.'* *Union Paper-Bag Machine Co. v. Murphy*, 97 U. S. 120, 125, 24 L. Ed. 935, 936." (Emphasis ours.)

The Court in that case did not limit the doctrine of equivalence to pioneer patents, it stated:

"The doctrine operates not only in favor of the patentee of a pioneer or primary invention, but also for the patentee of a secondary invention consisting of a combination of old ingredients which produce new and useful results. *Imhaeuser v. Buerk*, 101 U. S. 647, 655, 25 L. Ed. 945, although the area of equivalence may vary under the circumstances. See *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U. S. 405, 414, 415, 52 L. Ed. 1122, 1126, 1127, 28 S. Ct. 748, and cases cited; *Seymour v. Osborne* (U. S.), 11 Wall 516, 556, 20 L. Ed. 33, 42; *Gould v. Rees* (U. S.), 15 Wall 187, 192, 21 L. Ed. 39, 40."

What Constitutes Equivalency.

The Court in the *Graver v. Linde* case stated:

“What constitutes equivalency must be determined against the context of the patent, the prior art, and the particular circumstances of the case. Equivalence, in the patent law, is not the prisoner of a formula and is not an absolute to be considered in a vacuum. It does not require complete identity for every purpose and in every respect. In determining equivalents, things equal to the same thing may not be equal to each other and, by the same token, things for most purposes different may sometimes be equivalents. Consideration must be given to the purpose for which an ingredient is used in a patent, the qualities it has when combined with the other ingredients, and the function which it is intended to perform. *An important factor is whether persons reasonably skilled in the art would have known of the interchangeability of an ingredient not contained in the patent with one that was.* (Emphasis ours.)

“A finding of equivalence is a determination of fact. Proof can be made in any form: through testimony of experts or others versed in the technology; by documents, including texts and treatises; and, of course, by the disclosures of the prior art. Like any other issue of fact, final determination requires a balancing of credibility, persuasiveness and weight of evidence.”

In the instant case the interchangeability of outwardly extending shoulders, inwardly extending shoulders for breech and muzzle-loaded guns respectively is not only shown in the patent in suit but in the patented art, previously referred to.

Trial Court to Decide Question of Equivalency.

The Court in *Graver v. Linde* also stated:

“It (equivalency) is to be decided by the trial court and that court’s decision, under general principles of appellate review, should not be disturbed unless clearly erroneous. . . .

“It is not for this Court to even essay an independent evaluation of this evidence (evidence upon which the court concluded one element was the equivalent of the other). This is the function of the trial court. . . .”

In the *Pointer v. Six Wheel Corp.* case, decided December 27, 1949, 177 F. 2d 153, Your Honors held that the universal rubber joint was the equivalent of a ball and socket universal joint, and held that coil springs were the equivalent of leaf springs and at the end of the decision listed the many cases in support of the finding of the Trial Court on the doctrine of equivalence.

Claims 10 and 11 Are for Complete Combination in Eyes of Law.

The Trial Court, in holding claims 10 and 11 valid, stated [R. 349]:

“Fairly construed I think those claims describe the combination and all the essential elements of it with sufficient specificity to enable anyone versed in the art to practice that invention.”

Appellants argue that the claims are invalid because each and every element is not specifically set out in each claim, yet in another argument they say that the elements and their functions were known to those versed

in the art. The Patent Office in allowing claims 10 and 11 considered that these claims included all the essential elements necessary in order to carry out the function of the parachute flare signal. The law followed by the Trial Court is basic. In the case of *Webster Loom v. Higgins*, 105 U. S. 580, 586, 26 L. Ed. 1177, Mr. Justice Bradley stated:

“ . . . He (the inventor) may begin at the point where his invention begins, and describe what he has made that is new, and what it replaces of the old. *That which is common and well known is as if it were written out in the patent and delineated in the drawings.*” (Emphasis ours.)

One of the leading cases supporting the Trial Court's view is *Taylor et al. v. Sawyer Spindle Co.*, 75 Fed. 301 (C. C. A. 3) (1896). This case has been consistently followed by all the courts. In this case one of the essential elements, namely, the sleeve whirl, was not set out in the claims and defendant contended that the patent did not define an operative mechanism and was therefore, void. The Court stated at page 309:

“The law on this subject is too well settled to be open for discussion. A patentee is not required to claim the entire machine in each claim. Each of the claims at issue is for a complete combination of the spindle and its supporting tube and devices, and there was no necessity for expressing in terms the devices for revolving the spindle. Any appropriate means for operating it will be understood. The omission of the sleeve whirl does not affect the validity of either one of the claims, which belong to that class where reference may be made to the specifications to supply in a claim what it is plain, to

any one skilled in the art, is a necessary incident. *Reece Buttonhole Mach. Co. v. Globe Buttonhole Mach. Co.*, 10 C. C. A. 194, 61 Fed. 970; *Deering v. Harvester Works*, 155 U. S. 286, 15 Sup. Ct. 118."

In *Canda et al. v. Michigan Malleable Iron Co. (supra)*, the following language appears and it was held as follows:

"3. The counsel for appellee makes the point that claim 1 does not describe an operative structure, and he contends that, because a casing without a bottom would serve no purpose, and could be put to no use, this claim must fail. But it is erroneous to suppose that because the element, or the combination of elements, in a claim, do not of themselves constitute an operative thing, or one capable of any use, the claim is, therefore, void. No doubt that would be the result, if no useful place for it was known to those familiar with the art, and the inventor himself disclosed no relation in which it would be useful. All that is plain enough. . . . Nobody familiar with the subject could have any doubt from reading this claim, without more, as to the particular thing which the patentee claims as new, or in what relation to other parts, and what other parts, it was designed to be used. Aided by the specification, all doubt is removed as to what the more general statements of the claim mean."

In *Thomson-Houston Electric Co. v. Union Ry. Co.*, 84 Fed. 888 (Cir. Court, N. Y.), a weighted spring was omitted from the claims, the Court nevertheless held the claims valid and stated, page 890:

"A boy seated on the roof of the car could impart the upward pressure, not as economically nor as well

as the weighted spring would, but quite sufficiently to insure the operation of the combination expressed in the claim.”

In *Thomson-Houston Electric Co. v. Black River Traction Co.*, 135 Fed. 759 (C. C. A. 2), the Court stated, page 763:

“If the combination now claimed was new and useful, Van Depoele was entitled to make a claim for it, . . . As the means for doing this are described in the patent, and as at the date of the patent tension devices of various kinds for maintaining the normal relations between the contact device and the overhead conductor were well known in the art, it was unnecessary to specify these means in the claims. . . . The description in the patent of the whole machine, and of the means and mode by which the subcombination is brought into co-operative relation with the other parts, usually indicates how the subcombination may effect a useful result. When this is so, the combination need not be operative alone, because (to use the language of Mr. Walker) ‘utility is justly ascribed to things which have their use in co-operating with other things to perform a useful work’.” (Citing *Taylor v. Sawyer Spindle Co.*, *supra*.)

Attention is also directed to *Kenney Mfg. Co. v. J. L. Mott Iron Works*, 137 Fed. 431 (Cir. Court, N. Y.), the Court stated, at 432:

“. . . If the claim shows a combination of parts forming a workable device when attached to a structure for which it is evidently intended, it is enough. *Taylor v. Sawyer Spindle Co.*, 75 Fed. 301, 309,

22 C. C. A. 203. The engineer's brake valve is inoperative until connected with the air system of the train, but any one skilled in the art would know at once how to make such connection. The question is whether the combination of the claim, if in other respects patentable, can be used, without material changes, in other water-closet systems?"

In *Wright Co. v. Herring-Curtiss Co., et al.*, 204 Fed. 597, the Court held, page 607:

"(3) There was much discussion at the bar as to claim 3, which does not include the vertical rudder as an element. The important feature thereof is that the lateral marginal portions of the planes must be capable of movement to different angles relatively to the normal plane of the aeroplane and about an axis transverse to the line of flight; the purpose of said movements being to present to the atmosphere different angles of incidence. It was argued that without the co-operation of the vertical rudder the claim was wholly impracticable. . . . It is not essential to the validity of claim 3 that all parts of the machine, or all parts specified in other claims, which are necessary to its operativeness, should be included therein, and resort must be had to the specification for a disclosure of the parts necessary to insure the practicability of a patented device. (Citing *Thomas-Houston Electric Co. v. Black River Traction Co.*, 135 Fed. 759, 68 C. C. A. 461; *Deering v. Winona Harvester Works*, 155 U. S. 286, 15 Sup. Ct. 1187, 39 L. Ed. 153; *Taylor et al. v. Sawyer Spindle Co.*, 75 Fed. 301, 22 C. C. A. 203.)

“However, the specification and drawings of a patent may be referred to as an aid in construing a claim and a claim in a patent should be construed liberally so as to uphold and not destroy the right of the inventor,” (*Harman v. Scott*, 90 Fed. Supp. 486, at 492, citing *Temco Electric Motor Co. v. Apco Mfg. Co.*, 275 U. S. 319, 48 Sup. Ct. 170, 72 L. Ed. 298.)

To carry out appellants’ contention as to what a claim should contain would require each claim to be a complete specification within itself, opening wide the door for those who desire to appropriate the essence of the invention. For example, if it was necessary to require the patentee to state how thin the walls of the projectile shell were, as appellants contend, and such dimension was stated in the claim, anyone desiring to appropriate the invention could copy all of the essential elements of the invention and avoid infringement by utilizing a thinner wall, by employing a later discovered more sturdy metal alloy. Furthermore if the patentee was compelled to state the kind and the amount of powder to be used, those desiring to appropriate the essential elements of the invention could readily do so if he use a different quantity of a newly discovered high powered powder. Appellants cannot excuse their infringement based on inspecificity of the claim. It appropriated exactly what is shown in the patent in suit. Obviously someone skilled in the art was able to duplicate, for appellants, the patented invention as evidenced by the Chinese copy Plaintiff’s Exhibit 25.

Further Answering Appellants' Brief.

Under the heading "No Presumption of Validity Attaches to the Patent in Suit" in appellants' brief, appellants refer to the District Court of Maryland's decision in which the Court stated: "It is in no sense a pioneer patent." *The appellants failed to state that the Court there held that the patent was valid.* It was held not infringed. What is and what is not a pioneer patent, is always open to argument. The present invention discloses the first successful hand-held pistol-fired parachute type of flare for life boats.

Appellants also refer to the language of the Court of Appeals in stating "The validity of the patent is not free from doubt, but the question need not be decided here; . . ." The fact is that that Court did not hold the patent invalid and no patent ever issued which was free from doubt as to the validity.

The statement based on the fact that the Patent Office issued the patent through inadvertence, based on the ground that the Patent Office did not cite certain patents is merely argument. The Patent Office merely cites those references which are deemed to be the most pertinent. Although the Patent Office did not cite Exhibits F-III and F-XII and F-XXI which show a one-piece cartridge case having a percussion cap in the head thereof, it cited Exhibit F-IV which also shows a one-piece projectile shell with a percussion cap in the head thereof. The Patent Office did not cite Exhibits F-VIII and F-XIII for the reason that they have no pertinency whatsoever, and appellant has not indicated wherein they deemed they were of any pertinency. Although the Patent Office did not cite Exhibits F-XVI, F-XVII and F-XVIII, which

relates to parachute flares, it nevertheless cited Exhibit F-XXII and Exhibit F-XXIII which it correctly deemed was more pertinent than Exhibits F-XVI, F-XVII and F-XVIII.

Although the Patent Office did not cite the Exhibit F-XIX, it cited more pertinent references Exhibits F-XXII and F-XXIII. Exhibit F-XIX is not a pistol operated flare. It is an inexpensive aerial toy which is bottomed on the earth or platform. It employs a two-piece projectile shell and, therefore, the recoil of the explosion to lift the toy to 150 feet is much greater than that which could be withstood when pistol-fired. Although the Patent Office did not cite Exhibit F-XXVII, it cited, what it rightfully deemed more pertinent, references Exhibits F-XXII and F-XXIII.

The decisions cited by appellants to support their contention that the patent was issued through inadvertence, cannot be applied in the instant case *since those references*, cited by appellants in addition to those cited by the Patent Office, *are far less pertinent than those cited by the Patent Office.*

Under the heading in appellants' brief "The Evidence in This Case Compels Judgment of Invalidity," the illustration in plate 1, opposite page 12, is *not* shown in any of the references of record. *The illustration on plate 1 is merely a composition of various parts taken from various patents.*

"Prior patents 'cannot be reconstructed in the light of the invention in suit, and then used as a part of the prior art.'" *Payne Furnace and Supply Co. Inc. v. Williams-Wallace Co., supra*, citing *Mohr and Son v. Alliance Security Company*, C. C. A. 9, 14 F. 2d 799, 800.

Under the heading "Plaintiff's Admissions Compel Holding Claims 10 and 11 Invalid" and the plates appearing opposite page 18 of appellants' brief, merely show that appellee admitted that certain elements of the combination were old. There is no admission on behalf of appellee either under the many sets of requests for admissions and the proceedings before the Trial Court to the effect that the combinations shown in plate 2 are shown in the prior art.

Appellants, before Your Honors, like before the Trial Court had been endeavoring to confuse the issue by continuously harping on admissions made by appellee and by continuously insisting that a new element must be present in a new combination of old elements. Appellee has always maintained that claims 10 and 11 define a new combination of elements which produce a new and better result.

The argument starting on page 32, of appellants' brief together with the plates facing this page, are injected, it is believed, merely to further endeavor to confuse the issue before the Court. It will be observed that these plates VI, VII and VIII, each shows a cartridge case. What is more important, the projectile shell (which is not cross-hatched in these plates), is formed of a separate tube and a separate base. Claims 10 and 11 are not directed to a specific element but are directed to a combination of elements, one of which includes a one-piece projectile shell.

As Your Honors know, the Patent Office meticulously guards the public in its issuance of patents. The skilled Examiner must be satisfied with the language employed in the claims. Appellants cited rejected claim 38. The cancellation of a claim is not an admission that the

claim does not express invention. Such claim is cancelled without prejudice, particularly when other claims define the invention more clearly. Moreover claim 38 was not limited to a one-piece projectile shell having a *thin* side wall and a relatively *thicker* base. Nor did it specifically define a "flare," and it did not include the "means to prevent the collapse of the parachute."

Further as to Utility.

The bold type used by appellants "Plaintiff Cannot Point to a New Result. The Old Combination Is Invalid." cannot overcome the unrefuted testimony of Dr. Clauser and Mr. Hubbell to the effect that this was the first successful hand-held, pistol-fired, parachute flare, distress signal. The burden of showing lack of the utility of the invention rests upon the infringer, particularly when he makes exact copy of patented structure. Not one piece of evidence was offered to show that any of the prior art performed the result achieved by the patented invention, obviously for the reason that the prior art could not perform the function. The remark on the part of appellants alleging that Dr. Clauser "attempted to dramatize the trial by creating the impression that the patent relates to a combination of a sinking ship, a life raft, a parachute flare, and a rescue vessel 25 miles away," would have, it is believed, an entirely different effect than facetiousness, if one's life is in danger. Such remark can be readily made while sitting at one's desk. "Knowledge after the event is always easy, and, problems once solved present no difficulties, indeed, may be represented as never having had any, . . ." (*Diamond Rubber Co. v. Consolidated Rubber Co., supra.*) If one had to be shipwrecked and had a choice to choose the time,

would he choose the time when the industry was striving to perfect a successful flare and had a choice of the torch flare or flares like those in the prior art, or would he choose the time when each life boat was equipped with appellants' flare Exhibit 25, copied from the patent in suit.

The answer to the industry's problem was not solved by the toy Exhibit F-XIV. True the toy shot into the air 150 feet, but it was a toy; the projectile shell was formed of two pieces of material; what difference did it make if it leaked fire from the propelling charge in the cartridge case to the black powder in the projectile shell; such was considered merely a dud piece of firework display. The toy was not held in the hand. It was bottomed on something solid. The problem of recoil was nonexistent. The real answer for which the industry strove was not answered by this toy.

Appellants charge Appellee with frantic effort to salvage claims 10 and 11, alleging there was no novelty defined by the claims, causing delay and confusion of the Trial Court. The Trial Court clearly understood Appellee's position [R. 337].

"The Court: We get down to this patent in suit, and the plaintiff claims a combination of entirely old elements in a way so as to produce a new result. *Let's take it from the basis of the combination described in their claims 8, 10 and 11, which Mr. Schmieding mentioned this morning.* Let me put it this way: the combination appears to be useful and new as a combination in this field. Would you concede those two elements?" (Emphasis ours.)

Appellants Attempt to Evade Issue.

Appellants, before the Trial Court and as it continues to do before this Court, attempts to *evade this issue* of old elements producing a new result and continuously resorts to attempt to confuse the issue by injecting the necessity of a new element. In reply to the Court's question, above quoted, the following appears:

“Mr. Miketta: No, your Honor, and I will get to the answer to your question, but let me first call your attention to this: We are talking about a new element in this discussion, and I think that is a wrong approach, and perhaps that language is confusing.

The Court: *I am not considering any new elements; I am considering old elements in a new combination.*

* * * * *

The Court: There is no question but what this is a better device than anything that had been used theretofore? Is there any question about that?

Mr. Miketta: *It is a better device because they made this out of one piece.*

The Court: Yes, and the defendant has paid it the tribute of copying it.

Mr. Miketta: Certainly, any mechanic would know that.

The Court: Now, there is a question. Now, let's get down to a fine point. There was a storage battery before Ray-O-Vac, it worked; what did the patentee do there?

Mr. Miketta: He did not make an old element that formerly was made in two pieces out of one piece, your Honor; and that is your specific problem here.

The Court: He took some old elements and put them in a new combination, didn't he, and what was the new combination?

Mr. Miketta: Let's stick to the facts of this case, your Honor. Here we have an old projectile case made out of two pieces, and these people came along and made it out of one piece.

The Court: All right. Now, will you distinguish that for me, show me why that is not analogous to what was done in the battery case, Ray-O-Vac?

* * * * *

The Court: Mr. Miketta, is it your belief from the evidence here that the court should find that flares taught in the prior art can be shot at sea just as effectively and can be seen just as well with the same results as with this metallic cartridge?

Mr. Miketta: Yes, your Honor.

The Court: Is there anything here to show that? Isn't all the testimony to the contrary?" (Emphasis ours.)

At this point we wish to call your Honors' attention to the fact that *no evidence whatsoever was introduced to show that the prior art could perform the function of the patented structure for the simple reason that the prior art could not.* Appellants could not answer the Trial Court's question and merely stated:

"Mr. Miketta: Has your Honor any evidence to show—

The Court: Dr. Clauser testified that—

Mr. Miketta: I have read his testimony very carefully, your Honor, and I don't find that. He is a witness that has been with the plaintiff for a long time, yes, but why didn't they produce some tests, your

Honor? Why didn't they show it? What is good proof? What is evidence? Suppose it is cheaper, your Honor, does that make it an invention, just because it is cheaper? I would say not. There must be a new relationship between the elements, a new mode of operation."

The Court then states [R. 340]:

"The Court: If this is not the best known to the art, why would competition come along and instead of offering something better just copy what was there? Isn't that tribute itself a compliment?

"Mr. Miketta: It isn't a tribute to invention; *it is a tribute to commercial success*, perhaps. (Emphasis ours.)

The Court: Isn't it a compliment, a tribute to the contention or concession to the contention that this represents the most advanced and most improved state of the art?

Mr. Miketta: If we eliminate from our thoughts actual invention, perhaps it is, perhaps it is. Perhaps this is a very fine shell. It must be. It passes the specifications. The government seems to be happy with it.

The Court: And it must be a better shell or better flare than anything theretofore known to the art.

Mr. Miketta: I wouldn't say that, your Honor.

The Court: Why wouldn't the Coast Guard specify something as an alternative, perhaps, something known in the prior art?

Mr. Miketta: There are reasons. In the first place, they may not have anybody engaged in this business. Plaintiff here may have put everybody else out of business anyway."

Why appellants should make such statements is not understood. It will be recalled that in the case of *Kilgore v. Triumph*, the two-piece projectile shell was held not to infringe.

The Court further stated [R. 359]:

“What comment do you have to make, Mr. Miketta, on the long period of time that this problem had apparently existed without being solved?

Mr. Miketta: That, I think, is a lot of hokum for the simple reason . . . and that is indelicate language, your Honor . . . but frankly, this patent F-18 was involved in litigation before, and they made some representations during the trial of that case that this patent F-18, now expired, was the answer to the maiden's prayer. I have never seen an inventor who did not make that contention.

The Court: You and I do not have much difficulty, do we, in perceiving that there was a need for these purposes, for this sort of a device, and after all, we wonder why it was not thought of before, don't we? Aren't you surprised in view of this state of the art that this type of flare was not produced many, many years ago?

Mr. Miketta: I think it was produced, your Honor. The only reason that until the Coast Guard started actually setting forth specifications that a flare must go up to 150 feet to be useful, and caused all of the manufacturers to put in enough power so that it went up that high, and imposed a restriction on them that the candle power must be to a certain standard, there probably were manufacturers who had flares that went up as high, but perhaps they did not burn as brightly.”

There is no evidence whatsoever to support Mr. Miketta's (Counsel) statements.

"The Court: There isn't anything in the prior are to show that, is there? What I have in mind is this: The curvature of the earth has not changed.

Mr. Miketta: No.

The Court: So the need for a certain altitude to give a signal at sea has not changed.

Mr. Miketta: That is right.

The Court: And we have known the use of projectiles for many, many years and the means to project them. We have known the use of flares and even, I suppose, the parachute flares a good many years. Doesn't it seem strange that this need was not met sometime long before it was?

Mr. Miketta: Your Honor, remember this: This F-18 definitely states that it is to be projected a sufficient distance from any station afloat, or ashore. Now, this old expired patent said that the projectile was to be projected a sufficient distance from any station afloat, or ashore. The pistol—

The Court: To do what?

Mr. Miketta: Pardon?

The Court: In order to accomplish what?

Mr. Miketta: Well, this was a signaling, in order to signal properly, otherwise what function? The whole device is signaling.

The Court: It would not accomplish anything like the result that your client's flares, for example, accomplish today, would it?

Mr. Miketta: I don't know. Why shouldn't it if you put in the right flare composition into that F-18 device, and you put in a sufficiently large cartridge in the bottom, that thing will go up and it will

open because it even includes a stick that will prevent the parachute from collapsing.

The Court: *Oh, it will go up if it doesn't go to pieces.* (Emphasis ours.)

Mr. Miketta: Oh, they sold a lot of these things, your Honor, and they were satisfactory. They actually made them.

The Court: Were they satisfactory for present day service?

Mr. Miketta: Well, we are not studying or we are not judging the patent by government specifications.

The Court: Could they be projected to any such height?

Mr. Miketta: Yes, sir.

The Court: They could be?

Mr. Miketta: Why certainly they would go up that high. Remember this little gimmick that is patent F-21, I think—no. Well, it is just almost a toy but it is supposed to go up 150 feet in the air. That is F-19.

The Court: You do not think the device taught by the patent in suit even produced a better result?

Mr. Miketta: Every inventor claims he has a better result, your Honor.

The Court: I am asking you what you think about it.

Mr. Miketta: No, because you can make a device and not put in the right flare composition and you certainly won't have a better result, your Honor. You may not have any result. You can take the patent in suit, build a device exactly like the specifications call for, and it will not burn for a length of time sufficient to be even worth while as a signal. And if you take the claims, your Honor, a lot of claims do

not even say that you have to have a thick base and thin side walls. They do not teach you how to build a better flare. Of course, every patentee, every inventor claims that he has made an improvement.

The Court: Oh, yes.

Mr. Miketta: But this is not an inventive improvement. There is no invention in substituting a one-piece shell for a two-piece shell.

The Court: I would not have any trouble holding with you if I could just get this Ray-O-Vac case disposed of in some way.

Mr. Miketta: There was more than substitution in that case, your Honor. You will grant me that they at least turned the outer edges, but here it is nothing but substitution.

The Court: The cardboard containers sometimes have bottoms on them, don't they?

Mr. Miketta: That is right, but they don't crimp into. You see, when you take that outer cylinder—I don't know what I would do if I did not have hands—but if your Honor imagines that this is the upper edge of the cylinder and this is the bottom edge of that outside cylinder, and you turn those edges in against the upper and lower seals, then you have a clamping action there. You not only prevent that liquid from going upwardly, but you also bring them together. Now, paper would not do that. You can roll the edge of the paper, and they do roll the edge of the paper, but that is only as a decorative feature, almost, to prevent fraying, but it does not clamp down into the end seals and seal the liquid, preventing it from end movement. There is a difference there, your Honor.

Mr. Schmieding: With respect to F-18, your Honor, I call your attention to line 9 in column 1 of page 1, where the idea is to project a short but sufficient distance from the airplane. As Dr. Clauser testified, that is what this particular shell was made for.

Now, also, on page 2, column 1, line 39, the sentence starting there:

‘In the operation of the device, the initial velocity of the container B, after leaving the gun, will be comparatively small, * * *.’

Now, that is true, as Mr. Miketta stated. You can place a powder in there to lift that projectile up to the desired height. But, can you hold it in your hand? And if it can be done, why does defendant not make the expired apparatus instead of copying exactly the patent in suit?

The Court: *Isn't our question here probably this: Whether the result produced was so far superior to the result produced by any other combination as to be in effect a new result?* (Emphasis ours.)

Mr. Schmieding: That is right, your Honor. That is right. It is something that they have been striving for and never solved until these men conceived of this simple idea.”

The foregoing is a summary of the Trial Court's understanding of the invention, clearly showing that the combination of elements produced a new and useful result, clearly showing that appellants paid tribute to the invention, clearly showing that appellants could not distinguish the instant cause of action from the case of *Ray-O-Vac v. Goodyear*, and clearly showing that the Trial Court was not confused by appellants' conjured defense.

In order to attempt to justify their “conscious, deliberate and willful” infringement, appellants lifted excerpts from many decisions, none of which apply to the facts in the instant case.

In the case of the *Great Atlantic and Pacific Tea Company v. Supermarket Equipment Corporation*, the Supreme Court stated:

“Neither court below has made any finding that old elements which made up this device perform any additional or different function in the combination than they perform out of it. This counter does what a store counter always has done—it supports merchandise at a convenient height while the customer makes his purchases and the merchant his sales. The three sided rack will draw or push goods put within it from one place to another—just what any such a rack would do on any smooth surface—and the guide rails keep it from falling or sliding off from the counter, as guide rails have ever done. Two and two have been added together, and still they make only four.”

In the instant case under consideration, we do not add up to four, but we have produced the first successful distress signal for life boats. The court in the *A. and P.* case also states:

“ . . . when the whole in some way exceeds the sum of its parts is the accumulation of old devices patentable.”

Applicants copy an excerpt from *Bailey v. Sears, Roebuck & Company* (cited by appellants). The Court, however, stated in that case “*There was no new function performed by the combination. The function performed was*

merely to indicate the location of rotor blades, as in prior devices. Hence it was not patentable as a combination of old elements.” (Emphasis ours.)

In the case of *Goodman v. Hawkinson* (cited by appellants) the patent was directed to a method of retreading worn tire casings. This method involved three steps. Each of these steps in itself was old and the Court there held: “. . . the combination of these old steps used to retread a tire *did not result in a new product*” (emphasis ours). The Court here sanctioned the doctrine that the combining of old elements in a new combination, producing a new result, is entitled to the benefits of the invention,

“ . . . notwithstanding the use by him of elements which were old in the art. This position is perfectly tenable provided the combination is new and that a new and useful result has been obtained. This argument is met by the proposition that no new result is attained by the patentee. The same result which is obtained as a by-product of his invention had also been attained by prior inventors.”

In the case of *Magarian v. Detroit Products Co.* (cited by appellants), the Court merely recited the well known doctrine that:

“If they (elements) are all found in different prior patents and *no new functional relationship arises* from the combination, the claim cannot be sustained” (emphasis ours).

The Court there merely held that

“The combining of old elements does not rise to the dignity of invention unless a new result is produced or unless an old function is performed in a new way.”

The Ninth Circuit has never overruled the doctrine that a combination of old elements which produce a new result is patentable.

The same is true with respect to *Mettler v. Peabody Engineering Corporation* (cited by appellants). There the Court held,

“Hence, we have merely a combination of a number of old elements *producing the same result* produced by the prior burners . . .” (Emphasis ours.)

In the case of *Grinnell Washing Mach. Co. v. Johnson Co.* (cited by appellants), the Court stated:

“Confessedly all the elements of the Phillips patent are old. The merits of the combination, which, it is contended, involve invention and validate the patent, are that this gearing device, applied and operated as specified, enables the washing of a part of the clothes to be performed at the same time that the wringing process is being applied to other clothes . . . In the gearing specified every element is old. The operations of the wringer and the washing machine, although simultaneous, are independent one of the other. The control of the operation of the wringer is by an old and well-known method. From the co-operation of the elements, here brought together *no new result*, involving the exercise of the creative faculty which is invention, is achieved. . . . To borrow an illustration made at the argument, we think the Phillips aggregation of elements may be likened to the operation of a number of different machines in a factory by power applied from the same line shaft, each operation contributing its separate part to the production of a given result.” (Emphasis ours.)

That case like the *Great Atlantic and Pacific Tea Company* case, the result of the two elements added up to four, and therefore the case is not pertinent to the instant case wherein a new and useful result is achieved.

In the case of *General Electric Company v. Yost Electric Co.* (cited by appellants), the patent under consideration was a one-piece lining. The Trial Court found that “device consisted merely of making in one-piece that which was formerly made in two parts, *and performs no new function.*” (Emphasis ours.) The Court of Appeals also found that there was no new function performed by the one-piece lining. It stated:

“This was not new, because old one-piece lining effected the *same results in the same way*, the only difference being one of shape.” (Emphasis ours.)

On page 40 of appellants’ brief, appellants state “Plaintiff is challenged to point out wherein the old elements of the old combination described in claims 10 and 11 produce a ‘new or different function or operation than that theretofore performed or produced by them,’ ” and then cites as authority *Lincoln Engineering Co. v. Stewart-Warner Corp.*; *Cuno Engineering Corp. v. Automatic Devices Corp.*; *Toledo Pressed Steel Co. v. Standard Parts, Inc.*; and *Great A. & P. Tea Co. v. Supermarket Equipment Corp.* Appellants admitted that the invention had commercial success and that it must be a fine signal [R. 340]. Appellants paid tribute to the invention by making an exact copy of the patented structure.

The case of *Lincoln Engineering v. Stewart-Warner* (cited by appellants), is entirely foreign to the fact in the instant case. In that case the patentee invented a

new chuck. This new chuck performed no new function in the combination employing a compressor which was old in the art. Here the pump functioned the same as always and the chuck functioned as other chucks. Again we have two and two making four. These two elements did not cooperate to perform a new and useful result.

In the case of *Cuno Engineering Corp. v. Automatic Devices Corp.*, the alleged invention was directed to a cordless electric lighter for cigarettes. A thermostatic control automatically cut off the current to the heating coil when the temperature attained the proper temperature. Cordless electric lighters were old and thermostatic controls for interrupting circuits to heaters were old in electric heaters for vulcanizers, flat irons, coffee cookers, bread toasters, etc. In each of these thermostatic controls the circuit was closed manually and interrupted automatically after the heater temperature attained a predetermined value. The patentee in that case applied a well known automatic control to a cordless electric heater coil. The result accomplished by these elements was old. If invention was present, it was not in the combination of the cordless heater and automatic control, but would have been in the specific mechanism for effecting movement of the heater when released.

In the case of *Toledo Pressed Steel Co. v. Standard Parts, Inc.*, cited by appellants, the alleged invention was directed to a torch for burning liquid fuel. A wick receiving tube extended into the container for the fuel and was provided with a particular form of cap which prevented the extinguishment of the flare in all kinds of weather. Prior art showed that this same cap was used

in the same combination in street lamp-lighter's torches. The Court there states:

“As before, the torch continued to produce a luminescent, undulating flame, and the cap continued to let in air for combustion, to protect the flame from wind and rain and to allow it to emerge as a warning signal. *They performed no joint function. Each served as separately it had done.*” (Emphasis ours.)

We have previously discussed the *Great A. & P. Tea Co.* case.

Appellants also cite *Bassick Co. v. Hollingshead Co.* The question there involved was the same as in *Lincoln Co. v. Stewart-Warner Corp.* There as in the *Lincoln v. Stewart-Warner* case, the pump, hose coupling and pin setting and coupler did not cooperate to produce a new and useful result. Each functioned as they always had functioned in the same combination.

Appellants also cite *Lane Wells Co. v. M. O. Johnston Oil Field Service Corporation.* That case falls into the same category as the *A. & P.* case. Your Honors found in that case:

“It is also our conclusion that the Lane device constituted only a bringing together in juxtaposition of old and well known elements; that whatever advantageous results were thus accomplished were not different in character from the aggregate results of the old tools; and that in the Lane device there was lacking that mutuality of action, that joint, cooperative functioning of the old elements to produce a new and different result, which is essential to raise a mere aggregation to the level of a patentable combination.”

Judgment of Trial Court Should Be Sustained.

The evidence clearly shows that the patentee answered a long sought problem, obtained a result that was desired for many decades, and the *Ray-O-Vac v. Goodyear* case is controlling.

From the quotations herein it is obviously apparent that the Trial Court was not confused, as alleged by appellants, although appellants tried desperately to confuse the Court when the Court was rendering his opinion at the close of the trial. His Honor understood the problem facing the industry at the time that the invention was made. He appreciated the new result was obtained by the construction of the patent in suit. He clearly understood the prior art as presented by Mr. Miketta, as is evident from the record, pages 313-324. He was not misled by appellants' attempt to inject the doctrine, that a new element must be presented in an old combination. He fully appreciated plaintiff-appellee's willing admissions that elements of the combination were old, and fully understood plaintiff-appellee's position that although these elements were old, the combination of the same, produced new results that were patentable.

The Trial Court found, as the evidence shows, that muzzle-loading cartridge cases and breach-loading cartridge cases are, by law and fact, the equivalent of one another. He found that claims 10 and 11 are valid and infringed and that the infringement was conscious, deliberate and willful. The Court properly awarded costs.

It is no defense to state as appellants do, that the action was not brought in good faith and then refer to the *Triumph Explosives, Inc. v. Kilgore Mfg. Co.*, since in that suit the patent was declared valid.

Appellants' attempt to smear appellee's presentation of the case by saying that plaintiff first accused defendants of infringing all 23 claims, caused defendants to prepare their defense accordingly, and then reduced the claims piecemeal, is entirely unwarranted. Appellants do not substantiate this remark in their brief and cannot. Appellants never charged infringement of all 23 claims. More than a month before appellants filed their Answer, they were notified that appellee would rely upon claims 1 to 11 and 15 to 16. More than two years prior to the trial of the case, appellee withdrew claims 6, 15 and 16 from the charge of infringement. On the other hand, more than a year after the Bill of Complaint was filed, and after appellants were aware of the fact that appellee was going to rely only on claims 1 to 5 and 7 to 11 inclusive, appellants filed an Amended Answer setting up 17 additional references, many of which were foreign patents, citing a total of 40 references, thus increasing appellee's expenses in the preparation of the trial.

Appellee denies appellants' statements that plaintiff admitted that claims such as 1 were anticipated by Exhibit F-3. We merely agreed with the Court that the claim is broad but maintained that when the claim is read in the light of the four corners of the patent, it is directed to a projectile shell and therefore not anticipated by Exhibit F-3.

Appellants in their brief endeavor to make it appear that appellee, for the first time, at the end of the trial, voluntarily admitted that claims 6 and 12 to 23 were not infringed. The facts are that the question of infringement of claims 6 and 12 to 23 were not in issue except as to appellants' counterclaim and no evidence was ever introduced to show infringement of said claims.

With respect to appellants' statement that appellee admitted that claims 7 and 8 were invalid, a careful reading of the text shows that the Trial Court had reasons for holding claims 1, 2, 3, 4 and 5 invalid and we admitted only that if that same reasoning of the Court is applied to claims 7 and 8, then the Court should hold claims 7 and 8 invalid.

Appellants should not complain on the admission by appellee that claims 6 and 12 to 23 were invalid. Appellants brought on the question of validity of these claims, since they were not charged to be infringed at the time that appellants filed its counterclaim. Appellee was no longer interested in whether or not anyone else was infringing these claims, since the patent was about to expire. Appellants and appellee were the only manufacturers of the structure. Appellants were the only infringers [R. 112]. We merely desired to assist the Trial Court in disposing of the counterclaim which was brought merely for the purpose of harassing the appellee. We state: "We admit for simplicity that claims 12 to 23 are invalid, if that will clear up this matter." The same reasoning went with respect to claim 6.

Appellee, by its admissions, willingly admitted that elements of the combination were old, but always steadily maintained that the combination of these old elements produced a new and patentable result. Counsel for appellee knew the import of plaintiff's admission, and therefore the appellants' suggestion of the necessity of questioning such counsel's ability is beside the point.

We deny that appellee at any time attempted to repudiate its admission or engage in evasive or dilatory tactics.

We deny that we took unnecessary depositions in Ohio. We deemed that the depositions of Messrs. Long, Hubbard and Hatch were necessary. One count in the Bill of Complaint included unfair competition and we desired to show the Trial Court that we could perform the same result with shells which look entirely different than appellants' shell [R. 245]. The Trial Court requested that the experts shoot off these shells that met the government specifications, and that the experts "can come in to tell the Court—and tell us what the results of the tests were" [R. 246 and R. 247]. For that purpose we took the depositions of Mr. Long, Messrs. Hubbard's, Hatch's and Long's depositions were read into the record.

We challenge appellants' accusations of our "baseless assertions," our disregard "of the rules of the Court," our "evasive answers and our silly contentions." Appellants' accusations in its brief, are untenable. No designation to the record is made in their brief to substantiate their accusations.

We deny the allegation, made by appellants that we used confusing tactics and that our acts confused the Trial Court. We maintain that appellants endeavored to confuse the Trial Court in its attempt to misapply our admissions.

At this point it is believed advisable to inform Your Honors that the quoted section, on page 26 of appellants' brief, directed to 299 U. S. 98, is not an affirmation of the quoted part of the case of *Ray-O-Vac v. Goodyear*.

Trial Court Twice Adjudged Claims 10 and 11 Valid and Infringed.

After deciding from the bench, on November 3, 1950, that claims 10 and 11 were valid and infringed, appellants asked for the privilege of petitioning for a rehearing as to those claims [R. 348]. The Trial Court then repeated [R. 349]:

“The Court: Fairly construed I think those claims described the combination and all the essential elements of it with sufficient specificity to enable anyone versed in the art to practice that invention.

If you wish to make a motion for a new trial and point out any errors—

Mr. Miketta: I will consider that, your Honor.

The Court: I will be glad to entertain it. Or if you wish to argue the matter upon objections of the findings, you may present it that way.

Mr. Miketta: That may be the time to do it.

The Court: I will be glad to entertain it. We have it down to fine points now, and perhaps that might enable you to make a more helpful presentation. You may present your objections and any argument on it . . .”

Briefs were filed. Appellants requested a rehearing [R. 60]. The judgment of November 3, 1950, was vacated and the case was placed on the calendar for further oral argument [R. 240]. The Trial Court heard further argument of both parties on January 8, 1951; the Trial Court, upon reconsideration again on January 31, 1951, held claims 10 and 11 valid and infringed [R. 72].

Summary and Conclusion.

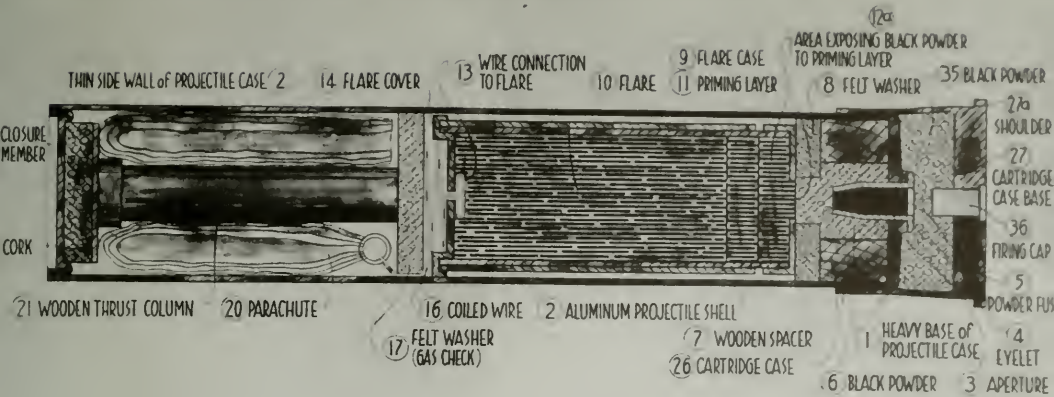
The record establishes that the Trial Court did not err in finding either time that the inventors: “produced a new combination of old elements which together produced a better result than anything previously known to the art” [R. 67]. That the invention “answered a long existing need which had not been answered by the prior art, and met with commercial success.” That “signal flares made in accordance with the patent in suit were the first successful distress signals which could be fired from a hand-held pistol and could be seen from a distance of 25 to 30 miles when shot by an occupant of a life boat” [R. 68]. That appellants’ flare “as exemplified by Exhibits 2 and 25 perform the same work in the same way by substantially the same structure defined by claims 10 and 11 of the patent in suit.” That appellants “manufacture and sell flares in violation of claims 10 and 11 of the patent in suit and thereby infringe said patent. The infringement by defendants has been and is conscious, deliberate and willful.” That claims 10 and 11 of the patent in suit “describe the combination and all essential elements of it with sufficient specificity and are valid and infringed” [R. 70].

Dated at Los Angeles, California, this 24th day of August, 1951.

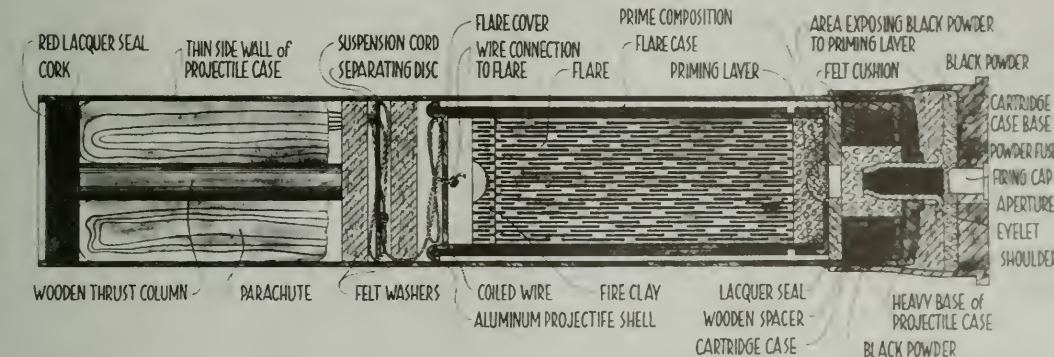
Respectfully submitted,

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PATENT 1,947,834



KILGORE



No. 12,892
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

SIGNAL MANUFACTURING COMPANY, a corporation, and
CHARLES SCHNEIDER, d.b.a. SIGNAL MANUFACTURING
COMPANY,

Appellants,

vs.

THE KILGORE MANUFACTURING COMPANY, a corporation,
Appellee.

REPLY BRIEF FOR APPELLANTS.

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Appellee.

REPLY BRIEF FOR APPELLANTS.

“The first point which comes to notice is that nowhere does appellant tell us of what the invention consists. If claimant cannot make a non-technical explanation of discovery, there is some indication that invention does not exist.”

Jacuzzi Bros. Inc. v. Berkeley Pump Co., et al.,
..... F. 2d (C. A. 9) decided July 23, 1951.

The above language is entirely applicable here. What is the invention in claims 10 and 11? Appellee cannot tell us.

NOTE: The parties shall be referred to as plaintiff and defendant. The references to the printed record shall be by R. followed by page number. Emphasized matter in decisions is by defendant.

Plaintiff, in its brief, persists in talking about “new result” but nowhere has the plaintiff pointed to a **specific new result or functional difference attained by the aggregation of elements composing claims 10 and 11.** No response has been made to defendant’s presentation of facts on pages 34-40 of the opening brief under the heading “**PLAINTIFF CANNOT POINT TO A NEW RESULT. THE OLD COMBINATION IS INVALID.**”

Plaintiff’s only statement in support of patentable invention in claims 10 and 11 appears on page 17 of its brief and reads as follows:

“* * * The substitution of a one-piece projectile shell, that is, a projectile shell in which the relatively thin side walls and the relatively thick base, being formed of one piece of metal, reduced to the very minimum any possibility of pre-ignition of that powder charge therein which is later used to eject the flare and the parachute from the shell, after the projectile reaches the zenith of its flight.”

The only benefit derived from such substitution is that it

“reduced to the very minimum any possibility of pre-ignition of that powder charge.”

This is an admission that the “benefit” is only **one of degree.** Plaintiff’s expert witness and technical director, Clauser, had stated that pre-ignition **would be prevented** if a **separate** bottom was tightly put on stating:

“A. It would as long as you get it to the point where you get it absolutely tight.” [R. 138; Deft. Br. p. 37.]

A difference in degree, resulting from the use of well-known mechanical equivalents, available to any mechanic, is not an inventive difference in function. One-piece projectile shells were known long before the patentees of the patent in suit [Ex. G, B5(d), R. 172; Deft. Br. pp. 17 and 22].

The so-called “new and better result” which plaintiff claims is therefore only a good result which can be attained in a number of different ways. It is not a new result, and the substitution of an old one-piece shell for a two-piece shell does not produce a new function.

“Although the claims of a patent, in order to comply with the statute, must be specific and deal with a definite construction, there is **no invention** in the placing together of devices well known in the art, **however novel and useful** may be the results, **unless a functional difference from all previously known constructions be achieved**. *Lincoln Engineering Co. v. Stewart-Warner Corp.*, 303 U. S. 545, 549, 550.”

Jacuzzi Bros., Inc. v. Berkeley Pump Co. et al.,
..... F. 2d (C. A. 9).

NO NEW FUNCTION RESULTS FROM THE SUBSTITUTION OF A ONE-PIECE CON- TAINER FOR A TWO-PIECE CONTAINER.

The authorities cited by defendant on pages 34-40 of its opening brief have been repeatedly recognized by this Honorable Court and the requirement that a combination of elements must produce a functionally different result in order to involve invention has been stated as follows:

“* * * Not a single element of plaintiff’s claim performs a function in the drive-in theatre significantly different from the function it has always performed: * * *. The assembly of the elements of a successful drive-in theatre was not inventive. Cf. *Sinclair & Carroll Co. v. Interchemical Corp.*, 1945, 325 U. S. 327.”

Park-In-Theatres, Inc. v. Seth D. Perkins, et al.,
..... F. 2d (C. A. 9), decided June 22,
1951.

Plaintiff was challenged to point out a new function. Plaintiff has not done this and cannot do so.

“If several old devices are so put together as to produce even a better machine or instrument than was formerly in use, but each of the old devices does what it had formerly done in the instrument or machine from which it was borrowed and in the old way, * * * it seems that the combination is not patentable. *Hailes v. Van Wormer*, 20 Wall. (87 U. S.) 353, 22 L. Ed. 241; *Reckendorfer v. Faber*, 92 U. S. 347, 23 L. Ed. 719.”

Brinkerhoff v. Aloe, 146 U. S. 515, 516, 36 L. Ed.
1068 13 S. Ct. 221.

It is deemed unnecessary to again review the factual evidence which convincingly and conclusively shows that each and every element of claims 10 and 11 appears in the prior art patents in the **same combination** for the **same purposes**, performing the **same functions** in the **same manner**. This is not denied by plaintiff. The devices of the prior art were signal flares; they included a cartridge and a projectile shell. When shot from a gun the cartridge or base remained in the gun while the projectile shell was discharged. After a predetermined time (controlled by the delay fuse) the contents of these prior art flares were discharged from the shell. The contents included a parachute and a candle as well as the well-known wads, gas checks, etc. The signal flare of claims 10 and 11 employs the same elements and functions in exactly the same way for the same purpose.

The claims of the patent in suit must be judged by what they say. The specifications of the patent cannot be rewritten by reference to extraneous matter. Claims 10 and 11 must be adjudged on the basis of the disclosures of the patent itself; they cannot be judged in the light of present-day practice since such practice may include information which the patent does not give.

ELEMENTS ESSENTIAL TO THE CONSTRUCTION OF A COMMERCIALY SUCCESSFUL FLARE ARE NOT RECITED IN CLAIMS 10 AND 11.

On pages 40 and 41 of Defendant's Brief, the point is made that the claims are invalid because they do not state (and the specification does not state) elements represented as "very, very important" or essential to the manufacture of a commercial flare by plaintiff's own expert witness and technical director, Clauser [R. 121, 132, 133, 134; R. 119-120; Ex. G, R. 181].

Plaintiff does not deny this contention. Claims 10 and 11 are invalid because they **do not state how** a suitable flare is to be made. The authorities require a holding of invalidity.

General Electric Co. v. Wabash Appliance Corp., et al., 304 U. S. 364;

United Carbon Co. v. Binney & Smith Co., 317 U. S. 228;

Kruger v. Whitehead, 153 F. 2d 238 (C. A. 9);

Timken Detroit Axle Co. v. Cleveland Steel Products Co., 138 F. 2d 267 (C. A. 6), cert. den. 326 U. S. 725, reh. den. 326 U. S. 808;

Waterhammer Arrester Corp. v. Tower, 156 F. 2d 775 (C. A. 7).

Since these essential elements are not specified, the structure recited in the claims would not operate. The findings are clearly in error and contradict plaintiff's own witness.

USEFULNESS OF FLARES CANNOT BE ATTRIBUTED TO WHAT IS SHOWN AND CLAIMED IN THE PATENT IN SUIT.

Plaintiff's argument seems to be that in order that a flare signal be visible from a distance of say, twenty miles, it must be shot high into the air, it must carry a flare of sufficient brilliance and must stay bright a sufficient length of time.

This concept of an end result is not inventive. It has always been known that the higher the object, the greater the range of sight.

More than 250 B. C. the ancients built the lighthouse of Pharos at Alexandria with the light at a height of 412 ft. to permit the light to be seen at a distance of 300 stadia (42 miles). The Very parachute signal flare shown on the United States Ordnance Blueprint dated August 6, 1918 [Deft. Ex. F-32, R. 222] was shot into the air as a signal flare. The Mark I parachute flares were shot at various heights up to 1200 ft. and the flare was suspended from a parachute during a 32 second burning time [Deft. Ex. F-30, R. 220, see pp. 287, 288 and 291]. These prior signal flares had utility. They were used during World War I. The fate of nations depended upon them, not only the boatloads of plaintiff's shipwrecked persons.

The patent in suit and claims 10 and 11 do not state:

- (a) What kind of powder to use to shoot the shell up to a desired unspecified height.
- (b) How much of such powder should be used.
- (c) The relationship between such powder and the strength and thickness of the bottom and walls of the container or projectile shell.

(d) How bright should the flare be.

(e) What composition to use in the flare to produce the necessary brilliance.

(f) How long it should burn to be easily observable.

(g) How much of such unspecified composition should be used to make it burn for a desired, unspecified length of time.

(h) How large should the parachute be in order to keep the flare at a desired height for a useful but unspecified length of time.

(i) The “essential” taper to the delay fuse (invented by Clauser and not by the patentees).

These and other necessary instructions are not stated in the patent in suit and therefore plaintiff's argument is totally irrelevant. The United States Coast Guard established requirements of .150' minimum height, 20,000 candle power, 30 second burning time. Any mechanic and man experienced in pyrotechnics could then make a successful flare by **using the construction of flares shown in expired patents** and putting in the necessary powder and flare compositions. That is not invention—it is simply the normal exercise of those skilled in the pyrotechnic art.

Claims 10 and 11 do not teach how to meet commercial acceptance by the Coast Guard. The claims are invalid. They do not define a structure which required invention over the prior art.

PURPORTED COMMERCIAL SUCCESS CAN- NOT SUSTAIN INVALID CLAIMS.

Plaintiff's own witnesses have testified that the utility of the commercial flare sold by plaintiff depends upon construction and contents which are **not defined in the patent** in suit and not in claims 10 and 11. The claims do not cover what is actually sold. But plaintiff, in its brief, talks about utility and "better results" and completely ignores the rule that

"Lack of invention being clear, no significance attaches to the fact, if it be a fact, that commercial success followed the claimed improvement. *Toledo Pressed Steel v. Standard Parts*, 307 U. S. 350."

Kugelman v. Sketchley (C. A. 9), 133 F. 2d 426.

"Commercial success alone is not sufficient to validate a patent."

Heath v. Frankel (C. A. 9), 153 F. 2d 369.

In *Funk Bros. Seed Co. v. Kalo Inoculant Co.*, 333 U. S. 127, 76 U. S. P. Q. 282, the Supreme Court admitted that the combination there considered had advantages for the farmer, and was of advantage to the dealer and manufacturer, because it reduced inventory problems. But such commercial advantages were not enough, the Court holding the claims invalid and stating:

"But a product must be more than new and useful to be patented; it must also satisfy the requirements of invention or discovery."

Commercial success does not substitute for invention.

Bailey v. Sears, Roebuck & Co., 115 F. 2d 904
(C. A. 9), cert. den. 314 U. S. 616;

Celite Corp. v. Dicalite Co., 96 F. 2d 242 (C. A. 9);

Thropp's Sons Co. v. Seiberling, 264 U. S. 320, 330;

Duer v. Corbin, 149 U. S. 216, 224.

“Ordinarily, in itself, it (commercial success) is not a criterion in determining whether there was invention or in arriving at its scope.”

Pointer v. Six Wheel Corp., 177 F. 2d 153 (C. A. 9).

Citing:

Marconi Wireless Co. v. United States, 320 U. S. 1, 20;

Klein v. City of Seattle (C. A. 9), 77 Fed. 200, 240;

Grayson Heat Control v. Los Angeles etc. Co. (C. A. 9), 134 F. 2d 478, 481.

Utility (much less patentable invention) is not reflected by commercial success or general use; the Supreme Court pointed out that many patent medicines have insignificant utility but are widely sold because of widespread advertising, large commissions to dealers, attractive packaging and the activity of salesmen. (*McClain v. Ortmyer*, 141 U. S. 419, 428.)

Plaintiff has been forced to talk about commercial success (because there is no invention) but this purported commercial success is not derived from the patent but instead from the extensive advertising [Pltf. Ex. 31] and the fact that plaintiff sues and harasses its competitors. The above salutary rules nullify plaintiff's argument.

CLAIMS 10 AND 11 ARE INVALID BECAUSE THEY CLAIM MORE THAN WAS INVENTED.

It is fundamental that claims should cover what was actually invented.

“* * * The patent is therefore void as claiming more than the applicant invented. The mere aggregation of a number of old parts or elements which, in the aggregation, perform or produce no new or different function or operation than that theretofore performed or produced by them, is not patentable invention. And the improvement of one part of an old combination gives no right to claim that improvement in combination with other old parts which perform no new function in the combination.”

Lincoln Co. v. Stewart-Warner Corp., 303 U. S. 545, 549.

Also see:

Bassick Co. v. Hollingshead Co., 298 U. S. 415, 424-425.

During trial plaintiff contended that the tapered end of the delay fuse was essential and novel [R. 121, 132, 133, 134]. Claims 10 and 11 are not directed to this.

During trial plaintiff contended that a wooden annulus to surround the charge was very important and novel [R. 119-120]. Claims 10 and 11 are not directed to this.

Under the authorities referred to above and quoted on pages 41-42 of defendant's opening brief, and on the facts, claims 10 and 11 are invalid. By inference, plain-

tiff admits that claims 10 and 11 are invalid on this ground and made no answer to this contention.

Defendant has asked plaintiff to state what was invented by the patentees of the patent in suit. In answer thereto, plaintiff has only referred to "a better result." But a result is not patentable.

"* * * Inasmuch as it is well settled that one cannot have a patent for the function or effect but only for the machine which produces the same, under repeated decisions the claims are invalid because they are within this category. *Morely Sewing Machine Co. v. Lancaster*, 129 U. S. 263, 32 L. Ed. 715; *The Corn-Planter Patent*, 23 Wall. 181, 23 L. Ed. 161; *Corning v. Burden*, 15 How. 252, 14 L. Ed. 683; *Risdon, etc., Locomotive Works v. Medart*, 158 U. S. 68, 39 L. Ed. 899; *Electric R. Signal Co. v. Hall R. Signal Co.*, 114 U. S. 87, 96, 29 L. Ed. 96; *O'Reilly v. Morse*, 15 How. 62, 120, 14 L. Ed. 601; *LeRoy v. Tatham*, 14 How. 156, 174, 14 L. Ed. 367."

Thordarson Electric Manufacturing Co. v. General Transformer Corp., 93 F. 2d 36, followed by this Court in *Shull Perforating Co. Inc. v. Cavins, et al.*, 94 F. 2d 357 (C. A. 9).

By failing to point to "invention," plaintiff admits that the claims are invalid on the above ground, in accord with the authorities.

THE CLAIMS ARE INVALID BECAUSE OF
PRIOR PATENTS NOT CONSIDERED BY
THE PATENT OFFICE.

“* * * Even one prior art reference, which has not been considered by the Patent Office, may overthrow the presumption of validity, and, when the most pertinent art has not been brought to the attention of the administrative body, the presumption is largely dissipated. Such is the case here.”

Jacussi Bros. Inc. v. Berkeley Pump Co., et al.,
..... F. 2d (C. A. 9).

In the instant case, the uncontradicted evidence shows that the Patent Office did not consider patents and publications upon which defendant relies. These prior art references show the same elements in the same relationship with the same functions. They describe parachute flares which “* * * may be safely carried and used in open boats or otherwise exposed either at sea, on land or in the air” and shot 60 ft. or more [Ex. F-18, R. 210, p. 2]. An object 60 ft. in the air is visible for 11.6 miles. The Very parachute cartridge Mark I shot from a hand pistol “* * * holds the illuminant suspended at a height of about 200 ft. during a time of ignition of from 10 to 15 seconds.” [Deft. Ex. F-30, R. 220, p. 291, not cited by the Patent Office.] An object 200 ft. in the air is visible for 22 miles.

The Patent Office did not have this data. These published facts show the grave error committed by the Patent Office and the Trial Judge in believing plaintiff that a “new result” was obtained.

DEFENDANT HAS NOT INFRINGED. PLAINTIFF FAILS TO POINT TO EVIDENCE IN SUPPORT OF THE ERRONEOUS FINDING OF INFRINGEMENT.

Claims 10 and 11 are specifically limited to a cartridge having an annular groove, to be shot from a muzzle loader. Defendant does not infringe because he does not use such groove (Deft. Br. pp. 43-46).

In attempting to excuse the unjustified finding of infringement, plaintiff falls back upon the doctrine of equivalents. An equivalent is something which performs the same result in the same way. That is not the case here. Breech-loading ammunition cannot be used in a muzzle loader.

There are four controlling reasons why claims 10 and 11 are not subject to the application of the doctrine of equivalents. Plaintiff admitted that this is an old and crowded art [R. 147].

FIRST: Cartridges with a shoulder or flange can only be used in breech-loading guns, such as approved by the United States Coast Guard. Defendant makes cartridges with a flange.

Plaintiff's former vice-president, who had charge of development and manufacture [R. 91], testified that the signal with the groove was "*** * * a different type of signal altogether**", could not be shot from the approved guns and was a muzzle loader [R. 97 and 258]. Clauser testified to the same effect [R. 143].

The limitation is purposeful, intentional and cannot be disregarded.

“We think that, when an inventor in a crowded art has used limitative language in setting forth his claim, such language should not be rejected as surplusage, but should be considered as narrowing the patent.”

Automatic Appliance Mfg. Co. v. McNiece Motor Co., 20 F. 2d 578 (C. A. 8).

SECOND: “Where there is an express limitation in the claim, there is no ground for application of the doctrine of equivalents if the accused device departs from the claim in that particular. *Lektophone Corporation v. Rola Company*, 282 U. S. 168; *D’Arcy Spring Co. v. Marshall Ventilated Mattress Co.*, 259 Fed. 236, 240.”

Dillon Pulley Co. v. W. H. McEachran, et al., 69 F. 2d 144 (C. A. 6).

THIRD: Claim 8 generically referred to “means” on the cartridge base for positioning the shell in a gun. This claim was held invalid and plaintiff’s counsel thought the Court should hold it invalid [R. 154].

The doctrine of equivalents cannot be invoked to give a claim the same scope as an admittedly invalid claim.

FOURTH: The doctrine of equivalents cannot be invoked to rewrite a claim. See *Reinharts Inc. v. Caterpillar Tractor Co.*, 85 F. 2d 628 (C. A. 9), and cases there cited.

The importance of the limitation appearing in claims 10 and 11 is emphasized by the fact that similar claims, including a onepiece shell (but not including the annular

groove) were rejected by the Patent Office Board of Appeals and disclaimed and withdrawn by the patentees [Ex. G, R. 179; also see discussion R. 61-62, Ex. A, p. 68].

It is only because of this express limitation to an annular groove, limiting the device to a muzzle loader, that claims 10 and 11 were allowed.

**THE FACTS IN THIS CASE CONCLUSIVELY
SHOW THAT DEFENDANT-APPELLANT
IS ENTITLED TO COSTS AND ATTOR-
NEY'S FEES INCURRED DURING TRIAL.**

Defendant is confident that this Court will reverse the Trial Court and hold that claims 10 and 11 are invalid and not infringed by defendant. In addition, in view of the current importance of the question of attorney's fees, it is respectfully requested that this Court express an opinion which would be of assistance to all Trial Judges in this Circuit in properly ruling on the question of attorney's fees. The facts of the instant case are believed to be clearly distinguishable from those considered by this Court in *Park-In-Theatres, Inc. v. Seth Perkins, et al.*, F. 2d, wherein Judge Hastie, speaking for this Circuit, stated that the Trial Court did not impose a sufficiently strict standard in finding cause adequate to justify an allowance of attorney's fees, but also stated that such an allowance

“* * * should be bottomed upon a finding of unfairness or bad faith in the conduct of the losing party, or some other equitable consideration of similar force, which makes it grossly unjust that the winner of the particular law suit be left to bear the burden of his own counsel fees * * *.”

This Court also implied that attorney's fees would be allowed if the record presented a picture of dilatory tactics or willful effort to prevent expeditious disposition of the litigation.

Defendant earnestly submits that in this case there is overwhelming evidence that the action was not brought in good faith; that the plaintiff knew that the patent in suit was invalid and defendant had not infringed two years before trial; that plaintiff wilfully made contradictory and misleading representations to the Trial Court; that plaintiff repudiated its admissions and denied statements of fact which were previously admitted, and that the vexatious and unjustified conduct and statements made before the Trial Court were prejudicial to defendant and constituted a contempt of court. These various acts of unfairness and bad faith which are "equitable considerations * * * which make it grossly unjust that the winner (defendant here) be left to bear the burden of his own counsel fees * * *."

In greater detail, the acts upon which this Court should instruct the Trial Court to assess attorney's fees against the plaintiff include the following:

Plaintiff in this case brought an action upon a patent whose validity was seriously questioned nine years ago. The District Court of Maryland had stated that the patent in suit was "* * * in no sense a pioneer patent * * *" and that "* * * there is nothing novel * * *" in the purported one-piece construction. Plaintiff brought this action with the knowledge that the 4th Circuit had stated: "The validity of the patent is not free from doubt." (*Triumph Explosives, Inc. v. Kilgore Manufacturing Co.*, 128 F. 2d 444.)

In addition to this cloud around the patent, plaintiff knew more than two years before trial that defendant was presenting prior art not considered by the 4th Circuit nine years ago. Plaintiff's eminent counsel is presumed to be an officer of the Court and has a duty not to misrepresent matters of fact to the Court. In the instant case plaintiff did not follow this precept. In 1948 plaintiff presented to the Trial Court that the only element of novelty was the one-piece case [R. 86]. During trial in 1950, plaintiff **repudiated** its position and claimed invention in other elements, such as the tapered end on the fuse:

"The Court: * * * Do you claim that there is anything about this invention that is new except the combination of elements?

Mr. Schmeiding: Yes, we do, your Honor.

The Court: What is it?

Mr. Schmieding: We claim there is something new in the shape of this particular eyelet." [R. 132.]

The argument about the tapered end of the nipple or eyelet was baseless because none of the claims refers to a tapered end on the eyelet or nipple and this was later admitted by plaintiff's counsel [R. 306].

In 1948 plaintiff admitted that the patentees did not invent the combination of a one-piece shell with a cartridge; they had disclaimed and withdrawn such claims as 35, 36 and 38 [Ex. A, p. 68; Ex. G, R. 179].

But two years later, during trial, plaintiff urged invention in such old and disclaimed combination.

In 1948 plaintiff admitted that there was no invention in the contents of the projectile and such admissions are in evidence as defendant's Exhibit G [R. 161-163]. How-

ever, upon trial in 1950, plaintiff **repudiated** its admission and stated that the entire mechanism is in issue:

“The Court: But what I understood from his statement was that it was the containers and not contents that were in issue, not the arrangement of the contents that were in issue here. Now, as I understand it, the entire mechanism is in issue here.

Mr. Schmieding: That is right, your Honor.

The Court: That is, not only the cartridge shell, the projectile shell, but the contents of both and the arrangement of them.” [R. 305.]

In 1948 plaintiff admitted that a one-piece projectile was not invented by the patentees of the patent in suit [Ex. G, R. 172]. During trial, however, plaintiff repudiated the above admission and representation, and instead stated that the one-piece projectile was novel:

“The Court: Is there any issue here over the contents of the shells, either shell, that is, the cartridge shell or the projectile shell?

Mr. Schmieding: Yes. Not in the cartridge shell. There is in the projectile shell. * * *” [R. 303-304.]

These instances of conflicting, contradictory and irreconcilable statements constituted a contempt of court. **There is no excuse whatsoever for repudiation of sworn admissions.** Plaintiff was guilty of an unjustified attempt to stab defendant in the back and surprise him during trial. Plaintiff was successful in its unconscionable tactics to the extent of confusing the Court and causing a miscarriage of justice.

Plaintiff's vexatious and improper tactics necessitated the presentation of additional evidence and thorough cross-examination of plaintiff's witnesses to re-establish

that which had been previously admitted by plaintiff and was in evidence as Exhibit G. Plaintiff's tactics imposed upon defendant the costs of an unnecessarily long record, memoranda and briefs in attempting to point out the true facts to the Trial Court.

Plaintiff brought the action on a large number of claims including claim 6. It was not until November 3, 1950, toward the conclusion of the trial, that plaintiff admitted that claim 6 was invalid:

"The Court: Do you claim it is valid?

Mr. Schmieding: No." [R. 154.]

Plaintiff argued that claims 7 and 8 were valid and infringed [R. 336] but on the last day of trial plaintiff admitted that the Trial Court should hold claims 7 and 8 invalid, stating:

"Mr. Schmieding: I think you should." [R. 154.]

Plaintiff represented that claim 9 referred to a one-piece shell.

"Mr. Schmieding: I was going to call your Honor's attention to that, that that does define the combination with the cartridge case and one-piece shell." [R. 147.]

Upon this representation, the Court first held claim 9 valid and infringed, but during the argument resulting therefrom, plaintiff admitted that claim 9 did not refer to a one-piece shell and the Court held the claim invalid [R. 151].

Does this Court intend to subject Trial Judges to the unfair tactics of plaintiff in this case without permitting the application of the salutary provisions of 35 U. S. Code, Section 70 which provides that reasonable attorney's fees should be awarded to the prevailing party upon entry of

judgment on any patent case? It is urged that in the instant case there was a **willful effort** by plaintiff to delay and confuse and to prevent expeditious and forthright disposition of the litigation. The Courts should not condone and encourage misrepresentation, shifty tactics and unfairness. Your Honors' attention is called to the recent decision of the Court of Appeals for the 4th Circuit, *Orrison et al. v. Hoffberger Co.*, decided July 26, 1951 (.... F. 2d, 90 U. S. P. Q. 195) wherein the Court found that there was **no reasonable ground** for the prosecution of a motion for new trial and approved the imposition of counsel's fees as well as expenses upon the moving party.

In the present instance the entire proceedings were based upon a patent whose validity was in doubt. Although the action was filed in October, 1947, it was not tried until the fall of 1950. Defendant had exerted every effort to crystallize the issues by presenting all of its prior art and by discovery procedures, including interrogatories and requests for admissions. Defendant had the right to rely upon the admissions made in 1948 and introduced such admissions in evidence as Exhibit G. Two years later, upon trial, plaintiff repudiates such admissions, confuses the Trial Court, and places defendant in the position of having to unnecessarily incur the expense of an appeal.

In the light of these facts, clearly established by the record, this Court is requested to hold claims 10 and 11 invalid and not infringed, and to remand the case to the Trial Court with instructions to find plaintiff guilty of a willful effort to prevent expeditious disposition of litigation, of unfairness and inequitable conduct which makes it grossly unjust that the defendant be left to bear the

burden of his own counsel fees, with instructions to assess defendant's counsel fees against the plaintiff "in order to prevent a gross injustice to an alleged infringer," pursuant to Congressional intent.

This Court is urged to issue such instructions in order to establish a dividing line between circumstances under which attorneys' fees can be allowed and those in which they should not be allowed. This Court has indicated the line of demarcation in the *Park-In-Theatres* case (Appeal No. 12627) and should give life and meaning to the standard there set forth.

In the instant case there is still a further ground which requires that attorney's fees be imposed against the plaintiff. The Federal Rules of Civil Procedure show that defendant is entitled to his attorney's fees because Rule 37(c) provides as follows:

"(c) Expenses on Refusal to Admit. If a party, after being served with a request under Rule 36 to admit the genuineness of any documents or the truth of any matters of fact, serves a sworn denial thereof and if the party requesting the admissions thereafter proves the genuineness of any such document or the truth of any such matter of fact, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making such proof, including reasonable attorney's fees. * * *"

Here, the plaintiff denied statements of fact which were previously admitted and no explanation was made for such repudiation. The facts therefore are even stronger than contemplated by Rule 37(c). There is no question but that defendant was forced to go to unnecessary expense in proving that which had been previously admitted by plaintiff.

PLAINTIFF KILGORE PERSISTS IN CONFUSING AND IMPROPER TACTICS UPON APPEAL.

During appeal plaintiff has disregarded the rules of Court. Plaintiff has failed to file a brief in this appeal within the time provided by Rule 20(3) of the Rules of Practice of this Court. The facts are as follows:

A. Defendant designated the record on appeal and such record was printed and served on June 1, 1951.

B. In conformity with Rule 20(1) of this Court, defendant-appellant printed, served and filed its opening brief within thirty days, on June 21, 1951.

C. Plaintiff Kilgore did not file its brief within thirty days, as required by Rule 20(3) of this Court; the brief was not received until August 27, 1951, thirty-seven days late. This disregard of Court Rules is inexcusable and has cost defendant's counsel great inconvenience.

Because plaintiff Kilgore did not file its brief under the rules, this Court may disregard plaintiff's brief (Rule 20(7)). It is to be noted that an application for extension of time was not made by plaintiff.

Plaintiff Kilgore is owned by Commercial Credit Corporation, a multimillion dollar organization with numerous and eminent counsel. There is no excuse for such counsel to fail to follow the rules of this Court unless such counsel feels that plaintiff corporation, because of its great size, can dictate its own rules to this Court.

Furthermore, plaintiff did not conform to the rules of this Court in failing to file a counterdesignation until the

record on appeal had been printed, served and filed. As a result, defendant-appellant has been faced with a “Supplemental Transcript of Record” which defendant did not see until after its opening brief had been filed. This “Supplemental Transcript of Record” is **totally unwarranted** and imposes an unnecessary burden upon this Court, since it is **filled with irrelevant matter**. There is no excuse for inclusion in the record of memoranda such as appear on pages 225-239 of the Supplemental Record. Even the Trial Court noted on the margin of such memorandum:

“The Court did not provide for memoranda of this type at the time of the ruling.” [R. 239.]

A record on appeal should not include argument by counsel, and still pages 251-252, 330-341, 350-356 consist of self-serving arguments of plaintiff’s counsel.

When an objection to a question is sustained and no appeal is taken therefrom, the record should not be burdened with the question, objection and ruling of the Court. But this has been repeatedly included in the Supplemental Record by plaintiff, as for example, on page 288.

Plaintiff has persisted in placing into the Supplemental Record a great deal of matter regarding proposed exhibits **excluded** by the Trial Court. The proposed exhibit is not before this Court on appeal. The material on page 275 is totally irrelevant.

Defendant, in its designated record, submitted condensed narrative statements of certain portions of the testimony in order to conserve time of this Court and

reduce costs, as for example, regarding Hubbard's deposition, the Hatch deposition and Clauser's qualifications. Plaintiff did not object to such narrative statements nor claim that they were unfair or inaccurate. Plaintiff belatedly printed the entire detailed and unnecessary testimony of these witnesses in its Supplemental Transcript.

The inclusion of all this unnecessary material in the so-called "Supplemental Transcript of Record" is a violation of Rule 75(e) of the Federal Rules of Civil Procedure, which states:

"All matters not essential to the decision of the questions presented by the appeal should be omitted."

It is respectfully submitted that by disregarding the Rules of Court in the manners above indicated, plaintiff-appellee has imposed a great and unnecessary burden upon this Court and upon defendant-appellant. It has been necessary to read and check many pages of improperly submitted material. It is submitted that all costs incurred by defendant-appellant on this appeal should be assessed against the plaintiff.

* * * * *

It would be a burden upon this Court to review the many misstatements in plaintiff's brief. Most of such misstatements are refuted by the publications and evidence; plaintiff's false statements are not supported by the record. Argument of such baseless assertions is unnecessary because the principal reasons for reversal of the Trial Court are clear.

SUMMARY AND CONCLUSION.

Defendant has called attention to evidence which shows that the findings of the Trial Court were clearly erroneous. Findings, such as 9 and 13, are contrary to the evidence of record. There is no "new result" or new function. Plaintiff has failed to identify a "new result." The Trial Court was clearly in error in finding infringement, because plaintiff's own witnesses identified the claimed structure as "a different type of signal altogether" [R. 258] with different uses.

Defendant has stuck to the facts and the accepted authorities. It is submitted that plaintiff has failed to answer the challenges presented in defendant's brief, and by its silence has admitted that the patent is invalid for having claimed more than was invented.

The judgment of the Trial Court should be reversed because:

- (1) There is no invention in substituting an admittedly old, one-piece shell for a two-piece shell in an old combination, with the same functions and results.
- (2) The Trial Court erred in finding a new combination. The combination is shown in prior patents and publications.
- (3) The Trial Court erred in finding a "new result." The evidence shows that parachute-type flares were sent to the same and greater heights, with flares of the same or greater brilliance, in the prior art.
- (4) The Court erred in finding that the structure of claims 10 and 11 produced a "new result." The claims as well as the specification fail to teach how to obtain a new result.

- (5) The Court erred in finding infringement. Specific limitations of claims 10 and 11 are not found in defendant's structure.
- (6) There is no evidence to support the Trial Court's finding of willful and deliberate infringement.
- (7) The record shows that plaintiff was on notice that its patent was of doubtful validity; that plaintiff made admissions of fact and then repudiated them during trial; that plaintiff made contradictory representations to the Trial Court; that plaintiff voluntarily admitted invalidity of claims on which it brought suit; that plaintiff disregarded Rules of Court; that such actions were inequitable, unfair and prejudicial to defendant, unnecessarily prolonging trial and constituting a willful effort to prevent expeditious and proper disposition of the litigation.
- (8) That plaintiff's acts in this case make it unjust that defendant bear his own counsel fees; the Trial Court should be instructed to ascertain and assess attorney's fees against plaintiff.
- (9) That costs on this appeal be assessed against plaintiff.

Dated at Los Angeles, California, this 31st day of August, 1951.

Respectfully submitted,

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W. W. GLENNY,

Attorneys for Defendants-Appellants.

